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NO. 14087

IN THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

UNITED STATES OF AMERICA, *Appellant*

versus

HENRY DEBROW, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FROM THE SOUTHERN DISTRICT OF MISSISSIPPI—JACKSON DIVISION

MEMORANDA FOR THE CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

No. 2165—CRIMINAL

UNITED STATES OF AMERICA

vs.

HENRY DEBROW

HONORABLE JOSEPH E. BROWN, United States Attorney, Federal Building, Jackson, Mississippi;

ATTORNEY FOR APPELLANT

HONORABLE E. B. TODD, Attorney at Law, 247 East Pascagoula Street, Jackson, Mississippi;

ATTORNEY FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14087

UNITED STATES OF AMERICA, *Appellant*

v.

HENRY DEBROW, *Appellee*

STIPULATION AS TO PRINTING OF RECORD

Subject to the approval of the court, it is hereby stipulated and agreed by and between counsel for the parties that only the following portions of the record on appeal received from the Clerk of the District Court need be printed, supplemented by this agreement:

1. The Indictment.
2. The motion to dismiss, without exhibits.
3. The opinion of the District Court sustaining the motion to dismiss.
4. The order of the District Court dismissing the indictment.
5. It is agreed that the typewritten record certified by the Clerk of the District Court constitutes the record on appeal and shall be considered by the court to the same extent as if it were printed; and that any party may print, as a part of or in connection with its or his brief, any portion of said typewritten record or may comment upon or otherwise use said typewritten record to the same extent as if it were printed.
6. The notice of appeal.
7. This stipulation.

/s/ Joseph E. Brown
United States Attorney
/s/ E. B. Todd
Attorney for Appellee

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 2165—CRIMINAL

UNITED STATES OF AMERICA, *Plaintiff*

vs.

HENRY DEBROW, *Defendant*

DEFENDANT

(FILED JULY 19, 1951)

THE GRAND JURY CHARGES:

1. That on or about the 9th day of April, 1951, at Jackson, and within the Southern District of Mississippi,

HENRY DEBROW,

the defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Subcommittee on Investigations, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to said oath, state a material matter which he did not believe to be true, that is to say:

2. That at the time and place aforesaid, the said Senate Subcommittee inquiring as aforesaid was conducting a

study and investigation of whether applicants for appointments to offices and places under the government of the United States had been and were being solicited and required by numerous persons within the State of Mississippi to make political contributions and donations as a condition precedent to receiving such appointments, and as a consideration in return for promises to use their support and influence in obtaining said offices and places for applicants seeking appointment thereto; and to determine whether the laws of the United States had been violated in connection with and as a result of such activities, the identity of any such person engaged therein, and the extent to which such improper and corrupt activities affected the operation of departments and agencies of the United States.

3. That at the time and place aforesaid, the defendant

HENRY DEBROW

duly appearing as a witness before the Senate Subcommittee and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

> SENATOR HOEY: Go ahead and state just what that situation was.
>
> MR. DEBROW: * * * On the way up Professor Hill said to me, "Mr. Debrow, you knowing these fellows, I would like to make a thousand dollar contribution. Would you make it for me?" I said, "Providing you are present, I will be glad to."

4. That the aforesaid testimony of the defendant, as he then and there well knew and believed was untrue in that on the way up to the Century Building, at Jackson, Mississippi, to see the members of the Mississippi Democratic Committee, Professor Hill did not state to the defendant that he would like to make a thousand dollar contribution to the Committee and requested the defendant to make the contribution for him. (Sec. 1621, Title 18, U. S. C.)

COUNT II

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

HENRY DEBROW

duly appeared as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before the Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: Go ahead and state just what that situation was.

MR. DEBROW: * * * On the way up Professor Hill said to me, "Mr. Debrow, you knowing these fellows, I would like to make a thousand dollar contribution. Would you make it for me?" I said, "Providing you are present, I will be glad to."

So he gave me ten $100 bills on the way from the Walthall Hotel to the Century Building, which I accepted.

2. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that on the way up to the Century Building, at Jackson, Mississippi, to see the members of the Mississippi Democratic Committee, Professor Hill did not give the defendant ten $100 bills. (Sec. 1621, Title 18, U. S. C.)

COUNT III

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

HENRY DEBROW

duly appeared as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified

falsely before the Senate subcommittee with respect to the aforesaid material matter as follows:

MR. DEBROW: * * * After going up the street, approaching the Century Building, there stood the committee, you might say the whole committee, standing out in front and they had adjourned for the week.

So I walks up to the committee that consisted of Mr. Hood, Mr. Mize, Mr. Rogers, and I don't recall whether Mr. Jackson was present or not, but Mr. Beasley was present, and I think Miss Yelverton, the acting secretary. So I said, "A couple of gentlemen would like to talk to you fellows." They said, "We are closed for the week. Tell them to come back next week." That was it, so I turned around and I said, "You heard what they said, so let's go."

So I said, "I had better give you your thousand bucks back. I cannot make your contribution for you today, Professor."

2. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that after going up the street to the Century Building for the purpose of conferring with members of the Mississippi Democratic Committee the defendant did not state to Professor Hill that he could not make the contribution for the Professor that day and that he had better return to him his "thousand bucks". (Sec. 1621, Title 18, U. S. C.)

COUNT IV

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

HENRY DEBROW

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before the Senate subcommittee with respect to material matter as follows:

MR. FLANAGAN: I realize that.

MR. DEBROW: And I didn't know at that time, at the beginning when he mentioned the thousand dollars, that Mr. Ayres was an applicant for this rural route.

2. That the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that defendant in the beginning when the thousand dollars was mentioned at the Walthall Hotel did know that Mr. Ayres was an applicant for a job as rural mail carrier. (Sec. 1621, Title 18, U. S. C.)

A TRUE BILL

/s/ D. F. McCormick
Foreman

/s/ Joseph E. Brown
JOSEPH E. BROWN,
United States Attorney.

/s/ Ben Brooks
BEN BROOKS,
Special Assistant to the
Attorney General

(TITLE OMITTED)

MOTION TO DISMISS INDICTMENT

(FILED SEPTEMBER 5, 1951)

Comes the defendant Henry Debrow, who moves the Court to dismiss the indictment pending against him, for the following reasons:

FIRST

That the indictment fails to allege that an oath was administered to this defendant on the occasion complained of by any person authorized to administer an oath; and the indictment fails to charge the defendant with the commission of any crime known to the law.

SECOND

That the indictment charges that this defendant unlawfully, knowingly and wilfully, and contrary to said oath,

state a material matter which he did not believe to be true, such charge being made in Paragraph One of Count One of the indictment, but in which paragraph the alleged material matter is not set forth.

THIRD

That in the Third Paragraph of Count One of said indictment, and in which Paragraph the alleged material matter is set forth, the indictment therein fails to charge that this defendant wilfully so testified. That said Paragraph fails to charge or allege to what extent or in what manner such testimony was material to the issue involved.

FOURTH

That in Count Two of the indictment, and in which Count the alleged material matter is set forth, the indictment therein fails to charge that this defendant wilfully so testified, and therein fails to charge or allege wherein or to what extent such testimony was material to the issue involved.

FIFTH

That in the Second Count of the indictment, and in which Count the alleged material matter is set forth, the indictment therein fails to charge that this defendant wilfully so testified, and such Count fails to charge or allege wherein or to what extent such testimony was material to the issue involved.

SIXTH

That in the Third Count of the indictment, and in which Count the alleged material matter is set forth, the indictment therein fails to charge that this defendant wilfully so testified, and such Count fails to charge or allege wherein or to what extent such testimony was material to the issue involved.

SEVENTH

That in the Fourth Count of the indictment, and in which Count the alleged material matter is set forth, the indictment therein fails to charge that this defendant wilfully so testified, and such Count fails to charge or allege

wherein or to what extent such testimony was material to the issue involved.

EIGHTH

That the wording of the indictment is too vague, indefinite and uncertain to charge the defendant with any specific offense, and is, as a whole, an attempt on the part of the Government, to select a small portion of the testimony of this defendant, and to magnify such testimony, without giving the defendant the benefit of material statements made prior to and after the portions of his testimony made on the occasion complained of, and thereby causing the defendant to be prejudiced, at the very outset, in the minds of the trial jury. That there is attached hereto as a part hereof, a true copy of this defendant's testimony on said occasion, and attested under oath of this defendant.

Respectfully submitted:

/s/ E. B. Todd
E. B. Todd, Attorney for
Henry Debrow, defendant.

A true copy of above motion delivered to Hon. Joseph E. Brown, U. S. District Attorney, this September 5, 1951.

/s/ E. B. Todd
E. B. TODD, Attorney.

(TITLE OMITTED)

ORDER

(FILED FEBRUARY 11, 1952)

This cause this day came on for hearing on the motion to dismiss in the above numbered and entitled cause, and the Court having heard and considered same fully, it is considered and so

Ordered,

that the motion to dismiss in above numbered and entitled cause be and the same hereby is dismissed.

ORDERED, this the 6th, day of February, 1952.

/s/ Allen Cox
UNITED STATES DISTRICT JUDGE
ENTERED: COB 5 P 977

(TITLE OMITTED)

OPINION

(FILED FEBRUARY 11, 1952)

The indictments in these cases are identical in language insofar as the question before the Court is concerned and undertake to state cases against the various defendants under Section 1621, Title 18, United States Code.

In each of them it is stated "the defendant herein having taken an oath before a competent tribunal, to-wit, a sub-committee of the Senate Committee on Expenditures in the Executive Departments, etc.".

These indictments are challenged on many grounds, which the Court is not now considereing, and this decision is based on a ground common to them all, that is to say, the failure of the indictments to set out who administered the oath and by what authority he acted.

If this be an essential element of a good indictment under the Perjury Statute (Section 1621, Title 18, United States Code), then we need only cite the opinion of Hutcheson, Circuit Judge, in *Grimsley v United States*, 50 Fed. 2nd 509, in which he says: "Indictment without proof can not support a conviction, so proof without indictment can not."; and the case of *Sutton vs United States*, 157 Fed. 2nd 663 to 671, in which the Court of Appeals of the United States for the Fifth Circuit, speaking through Circuit Judge Holmes, makes it perfectly clear that no streamlining of pleading in criminal cases can ever authorize or justify the omission from an indictment of any essential element of the crime sought to be charged.

This then brings the Court to a consideration of the question as to whether or not it is essential to tell the defendant in a perjury charge clearly who administered the oath to him and by what authority.

In the case of Hilliard vs. United States, 24 Fed. 2nd 99, Foster Circuit Judge, speaking for the Court says, "In charging perjury it is sufficient, but it is also necessary to set forth the substance of the offense, *and to show before*

whom the oath was taken, with the averment that the officer taking it had authority to administer it." (Emphasis added). It is true that here the Court was considering the question in the light of Rev. St. 5396 (18 U. S. C. A., Sec. 558) and the argument is made that since Congress did not bring this Section forward in the recodification, this is no longer binding nor sound law. With this I can not agree.

Almost from the beginning of the Republic, such a statute has been a part of our law and my thought is that in its enactment Congress was saying that no matter how many technical matters may be left out of an indictment for perjury, you must give the defendant the name and the authority of the person who administered the oath. I think this was merely the recognition by the legislative branch of the government of the justice of this and the necessity for it, if defendants were to have a fair chance to know what they were charged with.

This admonition of the Congress, seeking to safeguard the rights of citizens, should not be lightly cast aside by any United States prosecuting officer, nor by any Judge—this judgment and considered opinion of the Congress, made up of laymen and of lawyers, carries great weight with me. I think they meant to say, and I think, that the lenguage "Having duly taken an oath" is nothing but a conclusion of the pleader.

It is argued that by failing to bring this section forward in the recodification, Congress meant to abandon this. I think what they meant to say was that this principle is so thoroughly embedded in our law that it is not necessary longer to have it in the Statutes and make more cumbersome an already exceedingly large collection of Statutes.

It surely can not be argued that by failing to bring the Statute forward they meant to say it is no longer necessary to set out in the indictment that the matter was before a competent tribunal; that the matter sworn to was false, and that it was material. How then can it be said that the other necessary averment set out in the statute was intended to be no longer the law?

I think it is still the law. The motions to dismiss are sustained.

/s/ Allen Cox
ALLEN COX, United States
District Judge

(TITLE OMITTED)

NOTICE OF APPEAL

(FILED FEBRUARY 29TH, 1952)

The United States of America hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order, decision and judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, entered February 6, 1952, dismissing the indictment in this cause charging the defendant with violation of Title 18, Sec. 1621, United States Code, being an indictment charging the said defendant with perjury.

A copy of the Court's order dismissing the indictment and the opinion are hereto attached as Exhibits 1 and 2, respectively, and made a part hereof by reference.

This Notice of Appeal is prepared and given in accordance with Rule 37 of the Federal Rules of Criminal Procedure, and Title 18, Sec. 3731, United States Code.
Dated: February 29, 1952.

CERTIFICATE

I, B. L. TODD, JR., CLERK of the United States District Court for the Southern District of Mississippi, do hereby certify that the foregoing pages contain a true and correct transcript of the record in the case of UNITED STATES OF AMERICA V HENRY DEBROW, CRIMINAL ACTION NO. 2165, now on appeal to the Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, as the same now remains of record in my office at Jackson, Mississippi.

Witness my hand and seal of this office, this the 29th day of April, 1952.

/s/ B. L. Todd, Jr.
B. L. TODD, JR., Clerk
United States District Court
Southern District of Mississippi

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of December 8, 1952.

UNITED STATES OF AMERICA,

No. 14087 versus

HENRY DEBROW.

On this day this cause was called, and after argument by Ben Brooks, Esq., Special Assistant to the Attorney General, for appellant, and Ben F. Cameron, Esq., for appellee, was submitted to the Court.

* * *

Opinion of the Court and Dissenting Opinion of Richard T. Rives, Circuit Judge. Filed April 10, 1953.

IN THE

United States Court of Appeals For the Fifth Circuit

No. 14087

UNITED STATES OF AMERICA, *Appellant*,

versus

HENRY DEBROW, *Appellee*.

No. 14088

UNITED STATES OF AMERICA, *Appellant*,

versus

JAMES H. WILKINSON, *Appellee*.

No. 14089

UNITED STATES OF AMERICA, *Appellant*,

versus

ROY F. BRASHIER, *Appellee*.

No. 14090

UNITED STATES OF AMERICA, *Appellant*,

versus

CURTIS ROOMES, *Appellee*.

— —

No. 14091

UNITED STATES OF AMERICA, *Appellant*,

versus

FORREST B. JACKSON, *Appellee*.

Appeals from the United States District Court for the Southern District of Mississippi.

(April 10, 1953.)

Before HUTCHESON, *Chief Judge*, and BORAH and RIVES, *Circuit Judges*.

BORAH, *Circuit Judge*: These five appeals are in separate but common cases in each of which the District Court sustained a motion to dismiss the indictment for reason of its failure to set forth all of the essential elements of the crime of perjury charged. They will be covered by one opinion as they have most matters in common.

On July 19, 1951, separate indictments were returned against each of the appellees in the United States District Court for the Southern District of Mississippi. Each indictment charged that "the defendant . . ., having taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments . . . that he would testify truly, did unlawfully, knowingly and willfully, and contrary to said oath, state a material matter which he did not believe to be true, . . ." in violation of 18 U. S. C. § 1621. Section 1621 provides in pertinent part:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any

written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, . . ."

Prior to trial each of the appellees filed a separate motion to dismiss the indictment in which he was charged on the grounds, *inter alia*, that "said indictment fails to state an offense under § 1621, . . . or any other laws of the United States," and that said indictment "does not allege the essential elements of the crime of perjury, and does not allege essential and sufficient facts to support a verdict of guilty, and does not allege elements of the offense sufficiently to advise defendants in his defense." The motions came on for hearing and the District Court in an unreported opinion covering the five cases dismissed the indictments on the single and common ground that they failed to state all of the essential elements of a perjury charge in that the indictments did not set out who administered the oaths alleged by conclusion in the indictments and by what authority such person acted in the administration of such oath. Judgments of dismissal were entered in each case and the Government has appealed.

In concluding that the indictments should be dismissed the District Court relied in great measure on *Hilliard* v. *U. S.*, 5 Cir. 24 F. (2d) 99, wherein this guiding principal was announced: "In charging perjury, it is *sufficient*, but it is also *necessary* to set forth the substance of the offense, and to *show before whom the oath was taken, with the averment that the officer taking it had authority to administer it.*" (Emphasis supplied.) The Government seeks to avoid the impact of this language by arguing, (1) that this pronouncement is *dicta;* (2) that the language merely embodied the substance of R. S. 5396, 18 U. S. C. § 558, and no more supports the result reached than does this statute which was expressly repealed by Congress (62 Stat. 862; 80 Cong., 2d Sess., c. 645, June 25, 1948); and finally (3) that the *Hilliard* case did not announce a principle of law which may be considered presently applicable under Rule 7(c) Federal Rules of Criminal Procedure. None of these contentions are sound.

In the *Hilliard* case the indictment set forth not only that the defendant took an oath before the District Court; it averred further that the oath was administered in open court by Edwin R. Williams, "the duly appointed and constituted clerk of the said court." The indictment was attacked on the ground, among others that it did not show that the defendant was properly sworn. In rejecting this contention that the charge was inadequate the court did so because the indictment contained the essential averment of the name of the person administering the oath and that this person was the duly appointed clerk of court.

The case of *United States* v. *Dickford*, 9 Cir., 168 F. (2d) 26, upon which appellant relies does not militate in the slightest against the holding in the *Hilliard* case that is was necessary to the validity of the indictment that it specify the name and authority of the person who administered the oath. It decided only that where as in that case, the indictment informed the defendant that the oath was administered by the clerk of court, that it was sufficient because it was implicit from the facts pleaded[1] that the officer administering the oath was in fact possessed of the requisite authority, and there was no need to spell it out further as the averments made substantially satisfied the requirement of 18 U. S. C. § 558 which does not prescribe the precise language in which the averment of authority is to be couched.

It is true that this court in the *Hilliard* case did consider the question there presented in the light of R. S. 5396, 18 U. S. C. § 558, and because this statute was expressly repealed prior to the return of the present indictments the argument is made that the decision in this case did not announce a principle of law presently applicable under Rule 7(c) Federal Rules of Criminal Procedure. This old statute now repealed served a useful purpose. It was passed to eliminate many of the requirements of a perjury indictment which were considered too exacting by providing that indictments may dispense with the recital of specified records and proceedings that were at common law often held to be necessary parts of the indictment. *Markham* v. *United States*, 160 U. S. 319, 16 S. Ct. 288, 40 L. Ed. 441. But despite its minimum requirements this statute plainly required that the indictment should "set forth the substance of the offense charged upon the defendant, . . . and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same . . ." It may not therefore be rightly said that its repeal destroyed the requirements which form the basis of the *Hilliard* decision. But regardless of this statute and its repeal it still remains a fundamental requirement that every essential element of the crime sought to be charged must be stated in the indictment and so stated that the defendant from the allegation of the indictment may understand what he is called upon to defend. This the Sixth Amendment of the federal constitution requires.

Rule 7(c), 18 U. S. C. following section 687, relating to indictments generally, provides that "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." This Rule like its forerunner, R. S. 5396, is designed to simplify indictments by

[1] 28 U. S. C., Sec. 525 vests all clerks and their deputies with authority to administer oaths.

eliminating unnecessary phraseology which needlessly burdened many indictments under the former practice. It does not and it was never intended that this rule should alter or modify the fundamental functions and requirements of indictments. Every ingredient or essential element of the offense sought to be charged must still be alleged in the indictment. *Wilson* v. *U. S.*, 5 Cir., 158 F. (2d) 659, cert. den. 67 S. Ct. 1094, 330 U. S. 850, 91 L. Ed. 1293.

The fact that strict requirements and formalities of criminal pleadings under the common law rules have been modified by modern practice and rules does not justify omission of matters of substance from allegations of an indictment. It has long been settled in the federal courts that an indictment in the language of the statute is ordinarily sufficient. But where the statute itself omits an essential element of the offense or includes it only by implication the indictment must descend to particulars and charge every constituent ingredient of which the crime is composed. If the indictment sets forth every material fact necessary to inform the defendant with reasonable certainty of the nature and cause of the accusation against him so as to enable him to make his defense, and avail himself of his conviction or acquittal for protection against another prosecution for the same offense, it is sufficient.

The indictments under review do not allege an offense in the words of the statute although they do refer to the applicable statute. These indictments do not attempt to charge the name of the officer or the person whom the Senate subcommittee called upon to administer the oath. They inform defendants only that the oath was taken before a competent tribunal, a subcommittee of the Senate Committee on Expenditures, etc. Rule 7(c) requires that an indictment shall contain a *definite* written statement of the *essential facts*, constituting the offense charged and the paramount provisions of the Sixth Amendment are "that in all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." We think that it is essential to inform the accused by whom it is charged that he was sworn, either by disclosing the name of the person administering the oath, or his official capacity, and that he was in fact possessed of the requisite authority. These are matters of substance which affect the substantial rights of the accused. It is apparent to us as it was to the Supreme Court[2] that there can be no conviction of perjury "unless the oath in regard to which the perjury was charged was taken before an officer of some kind, having authority to administer the oath." And to borrow language of Judge Hutcheson in

[2] *United States* v. *Hall*, 131 U. S. 50, 9 S. Ct. 663, 33 L. Ed. 97.

Grimsley v. *United States*, 5 Cir., 50 F. (2d) 509: "As indictment without proof cannot support a conviction, so proof without indictment cannot." There is hardly need to say more.

The judgments are, and each of them is,

AFFIRMED.

RIVES, *Circuit Judge*, dissenting:

Count I of the indictment against Henry Debrow set out in the footnote[1] is typical of the indictments in these five cases. All five are dismissed on the single and common ground that the name and

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1 "THE GRAND JURY CHARGES:

"1. That on or about the 9th day of April, 1951, at Jackson, and within the Southern District of Mississippi,

HENRY DEBROW,

the defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Subcommittee on Investigations, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to said oath, state a material matter which he did not believe to be true, that is to say:

"2. That at the time and place aforesaid, the said Senate Subcommittee inquiring as aforesaid was conducting a study and investigation of whether applicants for appointments to offices and places under the government of the United States had been and were being solicited and required by numerous persons within the State of Mississippi to make political contributions and donations as a condition precedent to receiving such appointments, and as a consideration in return for promises to use their support and influence in obtaining said offices and places for applicants seeking appointment thereto; and to determine whether the laws of the United States had been violated in connection with and as a result of such activities, the identity of any such person engaged therein, and the extent to which such improper and corrupt activities affected the operation of departments and agencies of the United States.

"3. That at the time and place aforesaid the defendant

HENRY DEBROW

duly appearing as a witness before the Senate Subcommitte and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

"SENATOR HOEY: Go ahead and state just what that situation was.

"MR. DEBROW: * * * On the way up Professor Hill said to me, 'Mr. Debrow, you knowing these fellows, I would like to make a thousand dollar contribution. Would you make it for me?' I said, 'Providing you are present, I will be glad to.'

"4. That the aforesaid testimony of the defendant, as he then and there well knew and believed was untrue in that on the way up to the Century Building, at Jackson, Mississippi, to see the members of the Mississippi Democratic Committee, Professor Hill did not state to the defendant that he would like to make a thousand dollar contribution to the Committee and requested the defendant to make the contribution for him. (Sec. 1621, Title 18, U. S. C.)"

the authority of the person who administered the oath are essential elements of perjury and should be stated in the indictments.

With deference, I submit that the holding is extremely technical and is contrary to the letter and spirit of the pertinent Federal Rules of Criminal Procedure.[2]

Section 5396, Revised Statutes (Old 18 U. S. C. A. 558), under which *Hilliard* vs. *United States*, 24 F. 2d 99, was decided, has been repealed (62 Stat. 862; 80th Congress 2nd. Session c. 645, June 25, 1948). It had been replaced by the new rules and particularly by Rule 7(c).

If the indictment (see footnote 1, *supra*) is compared with the statute (substantially copied in main opinion), it will be seen that the indictment contains not merely the language of the statute but considerably more, and that was proper.[3]

It may be true that the language, "having duly taken an oath before a competent tribunal * * *" states a conclusion, while Rule 7(c) requires a "statemen of the essential *facts* constituting the offense charged * * *", but it seems to me that the real inquiry lies in the meaning of the word "essential" in that rule.

The roots of the principle that "essential facts" must be stated in the indictment are imbedded in the Constitution (Amendments V and VI). A bill of particulars cannot be used to cure an indictment fatally defective (*Jarl* vs. *United States*, 19 F. 2d. 891, 894, cf. *Williams* vs. *United States*, 164 F. 2d. 302), but it may be employed to discover all pertinent details, everything but the "essential facts". *Rosen* vs. *United States*, 161 U. S. 29, 34.

What facts then are "essential"? Is the present rule, as the majority holds, that "the indictment must descend to particulars and charge every constituent ingredient of which the crime is composed"? If so, we are still enmeshed in the technicalities of common law pleading, and the new rules have failed of their purpose (see Holtzoff, 3 F. R. D. 445, 448-449). It seems to me that

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[2] "Rule 2.

"These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

"Rule 7(c)

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *"

"Rule 52(a)

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[3] "There is only one exception to the rule that an indictment in the language of the statute is sufficient. The exception applies where the words of the statute do not contain all the essential elements of the offense". Norris, et al. vs. United States, 152 F. 2d 808, 810. See also Sutton vs. United States, 157 F. 2d 661, 663.

the "essential facts" required to be stated in the indictment do not include all of the details necessary to be proved by the Government, but only such facts as will meet the requirement of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *."

> "A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defence and to plead the judgment in bar of any further prosecution for the same crime." *Rosen* vs. *United States*, 161 U. S. 29, 34.

See also *Bartell* vs. *United States*, 227 U. S. 427, 431.

In *United States* vs. *Starks* (D. C. S. D. N. Y.), 6 F. R. D. 43, Judge Holtzoff stated the present test as to the sufficiency of an indictment as follows:

> "There are two tests that an indictment must meet: First, it must apprise the defendant of the specific offense with which he is charged . . . The second test is that the indictment must be sufficiently definite in order that if the defendant is later charged with the same offense he will be in a position to interpose a plea of double jeopardy."

It seems to me that a long line of decisions of this Court[4] culminating in *United States* vs. *Noral Williams, et al.*, No. 14,166, Ms., have established the principle that under the new rules an indictment which meets the requirements of the Sixth Amendment is sufficient.

When that test is applied to these indictments, it seems too clear for argument that each defendant was informed of the cause and nature of the offense with which he was charged so that he could properly prepare his defense if trial ensued and an attempt were thereafter made to try him again on the same charge, he could successfully interpose a plea of former jeopardy. The indictment charges, in accordance with one of the alternative provisions of the statute (18 U. S. C. A. 1621), that the oath was taken "before a competent tribunal". Further, it charges that the oath was "duly" taken (a fact not noted by my brothers). The Supreme Court has said that, "The word 'duly' means, in a proper way, or regularly, or according to law." *Robertson* vs. *Perkins*, 129 U. S.

[4] Among others see Norris vs. United States, 152 F. 2d 808, 810; Wilson vs. United States, 158 F. 2d. 659, 662; Lynch vs. United States, 189 F. 2d. 476, 479; cf. Sutton vs. United States, 157 F. 2d. 661, 663.

233, 236; followed in *Zechiel* vs. *Firemen's Fund Insurance Co.*, 61 F. 2d. 27. "Duly sworn" means a swearing according to law. 13 Words & Phrases (Perm. ed.) p. 627. The name and authority[5] of the officer who administered the oath are details which are matters of proof on the trial. So far as authority is concerned, any United States Senator, a member of the subcommittee, had authority to administer oaths to witnesses, 2 U. S. C. A. 191; *Sinclair* vs. *United States*, 279 U. S. 263, 291. Under the holding in *United States* vs. *Bickford*, 168 F. 2d. 26, the sufficiency of an averment that, "the oath was administered by some Senator, a member of the subcommittee", without naming him, could not be debated. The word "duly" carried that same meaning. In all probability, the defendants knew which Senator acted. If not, they could ascertain prior to trial by filing a motion for a bill of particulars. I cannot agree with the claim that the omission of this detail made their defenses more difficult, or prejudiced the defendants in any way. I, therefore, respectfully dissent.

Judgment.

Extract from the Minutes of April 10, 1953.

UNITED STATES OF AMERICA,

No. 14087 versus

HENRY DEBROW.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives, Circuit Judge, dissents."

* * *

[5] The Sixth Circuit has held that, "It is not required that the indictment must contain an allegation that an act done by a corporation was authorized by its officers and agents." Universal Milk Bottle Service vs. United States, 188 F. 2d. 959, 963.

Clerk's Certificate.

UNITED STATES OF AMERICA.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 16 to 30, next preceding this certificate, contain full, true and complete copies of the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 14087, wherein UNITED STATES OF AMERICA is appellant, and HENRY DERROW is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, numbered from 1 to 15, are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of April, A. D. 1953.

/s/ OAKLEY F. DODD,
Clerk, U. S. Court of Appeals,
Fifth Circuit.

SEAL

☆U. S. GOVERNMENT PRINTING OFFICE 1953—252243/P.O.1546

Supreme Court of the United States

No. 765, October Term, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY DEBROW

Order allowing certiorari

Filed June 15, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

263722—53 U. S. GOVERNMENT PRINTING OFFICE: 1953

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263721—53

NO. _____

IN THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

UNITED STATES OF AMERICA, *Appellant*

vs

JAMES H. WILKINSON, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI—JACKSON DIVISION

MEMORANDA FOR THE CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

No. 2166—CRIMINAL

UNITED STATES OF AMERICA

v

JAMES H. WILKINSON

HONORABLE JOSEPH E. BROWN, United States Attorney, Federal Building, Jackson, Mississippi,

ATTORNEY FOR APPELLANT

HONORABLE ALLAN T. EDWARDS, Attorney at Law, 236 West Capitol Street, Jackson, Mississippi,

ATTORNEY FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 14088

UNITED STATES OF AMERICA, *Appellant*

vs.

JAMES H. WILKINSON, *Appellee*

STIPULATION AS TO PRINTING OF RECORD

Subject to the approval of the court, it is hereby stipulated and agreed by and between counsel for the parties that only the following portions of the record on appeal received from the Clerk of the District Court need be printed, supplemented by this agreement:

1. The indictment.
2. The motion to dismiss, without exhibits. (Record, Page 8).
3. Additional motion to dismiss, without exhibits. (Record, Page 9).
4. Stipulation of counsel as to accuracy of exhibit to motion. (Record, Page 12).
5. It is agreed that the typewritten record certified by the Clerk of the District Court constitutes the record on appeal and shall be considered by the court to the same extent as if it were printed; and that any party may print, as a part of or in connection with its or his brief, any portion of said typewritten record or may comment upon or otherwise use said

typewritten record to the same extent as if it were printed. This part of this agreement also applies to the exhibits to the motions.

6. The opinion of the District Court sustaining the motions to dismiss.

7. The order of the District Court dismissing the indictment.

8. The notice of appeal.

9. This stipulation.

/s/ Joseph E. Brown
JOSEPH E. BROWN
United States Attorney
Southern District of Mississippi
Attorney for Appellant

/s/ Allan T. Edwards.
ALLAN T. EDWARDS
Attorney for Appellee

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 2166—CRIMINAL

UNITED STATES OF AMERICA, *Plaintiff,*

vs

JAMES H. WILKINSON, *Defendant*

(FILED JULY 19, 1951)

COUNT I

THE GRAND JURY CHARGES:

1. That on or about the 10th day of April, 1951, at Jackson, and within the Southern District of Mississippi,

JAMES H. WILKINSON,

the defendant herein, having duly taken an oath before a competent tribunal, to wit, a subcommittee of the Senate Committee on Expenditures in the Executive Departments, known as the Investigations Subcommittee, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and willfully and contrary to said oath, state a material matter which he did not believe to be true, that is to say:

2. That at the time and place aforesaid, the said Senate Subcommittee inquiring as aforesaid was conducting a study

and investigation of whether applicants for appointments to offices and places under the government of the United States had been and were being solicited and required by numerous persons within the State of Mississippi to make contributions and donations as a consideration precedent to receiving such appointments, and as a consideration in return for promises to use their support and influence in obtaining said offices and places for applicants seeking appointments thereto; and to determine whether the laws of the United States had been violated in connection with such activities, the identity of any such persons engaged therein, and the extent to which such improper and corrupt activities affected or influenced the operation of agencies and departments of the United States.

3. That at the time and place aforesaid, the defendant

JAMES H. WILKINSON,

duly appearing as a witness before the Senate Subcommittee and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: All these people you contacted whom I mentioned, they were selected as managers for their counties?

MR. WILKINSON: Selected for what?

SENATOR HOEY: Or Chairman, or whatever you call them.

MR. WILKINSON: No, there wasn't any chairmen, or anything at all. They were written a letter saying that the committee appreciated the work that they were willing to do.

4. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that the persons whom he contacted with reference to making donations and contributions to the Mississippi Democratic Committee were to be selected and recognized as the chairmen and managers for their counties. (Sec. 1621, Title 18, U. S. C.)

COUNT II

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

JAMES H. WILKINSON,

duly appeared as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before the said Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: You just got one person in a place?

MR. WILKINSON: That is true, but there aren't any chairmanships.

SENATOR HOEY: He was something there.

MR. WILKINSON: Well, he was, but he was a person trying to work for the furtherance of the Mississippi Democratic Committee or Party.

SENATOR HOEY: He had some official standing because you just selected one for a county.

MR. WILKINSON: No, he did not have an official standing at all.

2. That the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that the persons contacted by the defendant in the various counties, and who were to make contributions to and do work for the Mississippi Democratic Committee, were to be recognized by the Mississippi Democratic Committee as having an official standing in the form of County Chairmen for their respective counties. (Section 1621, Title 18, U. S. C.)

COUNT III

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

JAMES H. WILKINSON,

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before the said Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: Now, in your efforts to build up the party, did you make one of the prime purposes getting contributions from men who would be managers in the different counties?

MR. WILKINSON: That was not one of the prime purposes at any time. It looks like I was a piker from what I have been hearing here, because the fellows I talked with at all about contributions were in small terms. Most of them ran from $50, $100, and $150, along in there, the people who did give me contributions.

2. That the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that the defendant did, as a representative of the Mississippi Democratic Committee, make it one of his prime purposes the getting of contributions from men who would be named managers in the different counties. (Sec. 1621, Title 18, U. S. C.)

A TRUE BILL,
/s/ D. F. McCormick
Foreman

/s/ Joseph E. Brown
JOSEPH E. BROWN
United States Attorney
/s/ Ben Brooks
BEN BROOKS
Special Assistant to the
Attorney General

(TITLE OMITTED)

MOTION

(FILED SEPTEMBER 5, 1951)

The defendant moves that the indictment be dismissed on the following grounds:

The indictment does not state facts sufficient to constitute an offence against the United States for the reason that the statements of defendant that are alleged to be false in counts one, two and three are not material matter in that according to each count they refer to the organization of the Mississippi Democratic Committee or Party at the county level, or contributions to the Mississippi Democratic Committee or Party by prospective county political chairmen; while the tribunal before which the alleged false statements were made was, according to the indictment, created and authorized to conduct a study and investigation to determine whether or not Section 215, Title 18, United States Code was being violated and the extent to which such violations affected or influenced agencies or departments of the United States.

/s/ James H. Wilkinson by
Allan T. Edwards, Atty

I, Allan T. Edwards, attorney for the defendant, certify that I have this day served a true copy of this motion on Joseph E. Brown, United States Attorney.

Certified this the 5th day of September, 1951.

/s/ Allan T. Edwards

(TITLE OMITTED)

MOTION

(FILED SEPTEMBER 13, 1951)

The defendant move that the indictment be dismissed on the following grounds:

1. Proof of criminal intent and knowledge of falsity are impossible.

The three counts of this indictment are based on statements or questions of the examiner and responses of the defendant, which are taken from a complete examination reported in approximately 12 printed pages.

The counts are laid in reverse order to the extent that the statements in the 3rd count were made first, the statements in the 1st count were made second and the statements in the 2nd count were made last, although all relate to the same general subject; the organization of the Democratic party at the county level.

A reading of the testimony, a copy of which is hereto attached, will reveal that the three statements were taken from a complete examination on the subject; and a reading of all answers to questions related to the propositions delineated in the indictment will reveal the impossibility of proving criminal intent on the part of defendant to swear falsely for the following reasons:

a) The answers given, and alleged to be false, were with reference to propositions susceptible of different interpretations as to meaning. The full text reveals a disagreement between the witness and the examiner.

b) In connection with the statements made in answer to previous and following consecutive questions, full explanation was made and full information given with respect to all facts relating to the excerpted statements alleged to be false.

Careful reading of the record of testimony will reveal considerable argument between the examiner and the witness with respect to these particular points and others and will further reveal that the witness was frequently required to respond to statements rather than to questions. The statements and questions frequently contained principal and surbordinate propositions so phrased as to gain an unintentional admission of fact while purporting to seek only the answer to the principal proposition. Frequently questions were put to this witness before he could complete his answer to the preceding one. The witness complained on one occasion of coercion. All these things taken together

indicate without doubt that the method of the examiner was such that it excited the witness.

2. Since the alleged false statements are in the nature of construction or interpretation and nomenclature, it will be impossible for the prosecuting authority to prove the falsity except by a different construction; and if that is proved it will be impossible to corroborate that construction by facts or circumstances, but possible if the court will admit in evidence a second interpretation in agreement with the first offered by the prosecuting authorities. In that event we will open the doors of the jail to all who are willing to swear to an opinion representing the minority view.

James H. Wilkinson

/s/ Allan T. Edwards
ALLAN T. EDWARDS, Attorney.

I, Allan T. Edwards, attorney for the defendant, certify that I have this day served a true copy of this motion on Joseph E. Brown, United States Attorney.

Certified this the 14th day of September, 1951.

/s/ Allan T. Edwards

(TITLE OMITTED)

STIPULATION

(Filed on September 13, 1951 together with the motion immediately foregoing)

Allan T. Edwards, attorney for the defendant, and Joseph E. Brown, United Sattes attorney, stipulate that the attached transcript of the testimony of James H. Wilkinson is an accurate copy of the official report of the testimony before the Investigations Subcommittee of the Committee on Expenditures in the Executive Departments, United States Senate, Eighty-Second Congress, First Session, Pursuant to Senate Resolution 51 of the First Session of the Eighty-Second Congress, this the 14th day of September, 1951.

/s/ Allan T. Edwards
/s/ Ben Brooks

(TITLE OMITTED)

ORDER

(FILED FEBRUARY 11, 1952)

This cause this day came on for hearing on the motion to dismiss in the above numbered and entitled cause, and the Court having heard and considered same fully, it is considered and so

Ordered,

that the motion to dismiss in the above numbered and entitled cause be and the same hereby is dismissed.

ORDERED, this the 6th day of February, 1952.

/s/ Allen Cox
UNITED STATES DISTRICT JUDGE

ENTERED: COB 5—P 977

(TITLE OMITTED)

OPINION

(FILED FEBRUARY 11TH, 1952)

The indictments in these cases are identical in language insofar as the question before the Court is concerned and undertake to state cases against the various defendants under Section 1621, Title 18, United States Code.

In each of them it is stated "the defendant herein, having taken an oath before a competent tribunal, to-wit, a sub-committee of the Senate Committee on Expenditures in the Executive Departments, etc".

These indictments are challenged on many grounds which the Court is not now considering, and this decision is based on a ground common to them all, that is to say, the failure of the indictments to set out who administered the oath and by what authority he acted.

If this be an essential element of a good indictment under the Perjury Statute (Section 1621, Title 18, United States Code), then we need only cite the opinion of Hutcheson, Circuit Judge, in *Grimsley vs. United States,*

50 Fed. 2nd 500, in which he says: "Indictment without proof can not support a conviction, so proof without indictment can not."; and the case of *Sutton vs United States*, 157 Fed. 2nd 663 to 671, in which the Court of Appeals of the United States for the Fifth Circuit, speaking through Circuit Judge Holmes, makes it perfectly clear that no streamlining of pleading in criminal cases can ever authorize or justify the omission from an indictment of any essential element of the crime sought to be charged.

This then brings the Court to a consideration of the question as to whether or not it is essential to tell the defendant in a perjury charge clearly who administered the oath to him and by what authority.

In the case of *Hilliard vs United States*, 24 Fed. 2nd 99, Foster, Circuit Judge, speaking for the Court says, "In charging perjury it is sufficient, but it is also necessary to set forth the substance of the offense, and *to show before whom the oath was taken, with the averment that the officer taking it had authority to administer it.*" (Emphasis added). It is true that here the Court was considering the question in the light of Rev. St. 5396 (18 U. S. C. A., Sec. 558) and the argument is made that since Congress did not bring this Section forward in the recodification, this is no longer binding nor sound law. With this I can not agree.

Almost from the beginning of the Republic, such a statute has been a part of our law and my thought is that in its enactment Congress was saying that no matter how many technical matters may be left out of an indictment for perjury, you must give the defendant the name and the authority of the person who administered the oath. I think this was merely the recognition by the legislative branch of the government of the justice of this and the necessity for it, if defendants were to have a fair chance to know what they were charged with.

This admonition of the Congress, seeking to safeguard the rights of citizens, should not be lightly cast aside by any United States prosecuting officer, nor by any Judge—this judgment and considered opinion of the Congress, made

up of laymen and of lawyers, carries great weight with me. I think they meant to say, and I think, that the language "Having duly taken an oath" is nothing but a conclusion of the pleader.

It is argued that by failing to bring this section forward in the recodification, Congress meant to abandon this. I think what they meant to say was that this principle is so thoroughly embedded in our law that it is not necessary longer to have it in the Statutes and make more cumbersome an already exceedingly large collection of Statutes.

It surely can not be argued that by failing to bring the Statute forward they meant to say it is no longer necessary to set out in the indictment that the matter was before a competent tribunal; that the matter sworn to was false, and that it was material. How then can it be said that the other necessary averment set out in the statute was intended to be no longer the law?

I think it is still the law. The motions to dismiss are sustained.

/s/ Allen Cox
ALLEN COX, United States
District Judge

(TITLE OMITTED)

NOTICE OF APPEAL

(FILED FEBRUARY 29TH, 1952)

The United States of America hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order, decision and judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, entered February 6, 1952, dismissing the indictment in this cause charging the defendant with violation of Title 18, Sec. 1621, United States Code, being an indictment charging the said defendant with perjury.

A copy of the Court's order dismissing the indictment and the opinion are hereto attached as Exhibits 1 and 2, respectively, and made a part hereof by reference.

This Notice of Appeal is prepared and given in accordance with Rule 37 of the Federal Rules of Criminal Procedure, and Title 18, Sec. 3731, United States Code.

Dated: February 20, 1952

/s /Joseph E. Brown
JOSEPH E. BROWN,
United States Attorney,
Jackson, Mississippi

/s/ Robert E. Hauberg
ROBERT E. HAUBERG,
Assistant United States Attorney,
Jackson, Mississippi

/s/ Ben Brooks
BEN BROOKS
Special Assistant to the
Attorney General
Washington, D. C.

CERTIFICATE

I, B. L. TODD, JR., CLERK of the United States District Court for the Southern District of Mississippi, do hereby certify that the foregoing pages contain a true and correct transcript of the record in the case of UNITED STATES OF AMERICA V JAMES H. WILKINSON, CRIMINAL ACTION NO. 2166, now on appeal to the Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, as the same now remains of record in my office at Jackson, Mississippi.

Witness my hand and seal of this office, this the 29 day of April, 1963.

/s/ B. L. Todd, Jr.
B. L. TODD, JR., CLERK
UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF MISSISSIPPI

That the after the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz.:

Argument and Submission.

Extract from the Minutes of December 8, 1952.

UNITED STATES OF AMERICA,

No. 14088 versus

JAMES H. WILKINSON.

On this day this cause was called, and after argument by Ben Brooks, Esq., Special Assistant to the Attorney General, for appellant, and Ben F. Cameron, Esq., for appellee, was submitted to the Court.

* * *

Judgment.

Extract from the Minutes of April 10, 1953.

UNITED STATES OF AMERICA,

No. 14088 versus

JAMES H. WILKINSON.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives, Circuit Judge, dissents."

* * *

Clerk's Certificate.

UNITED STATES OF AMERICA.
UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 19 to 33 next preceding this certificate, contain full, true and complete copies of the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 14088,

wherein UNITED STATES OF AMERICA is appellant, and JAMES H WILKINSON is appellee, as full, true and complete as the original of the same now remain in my office.

I further certify that the pages of the printed record numbere from 1 to 18 are identical with the printed record upon which sai cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix th seal of the said United States Court of Appeals at my office in th City of New Orleans, Louisiana, in the Fifth Circuit, this 21st da of April, A. D., 1953.

/s/ OAKLEY F. DODD,
Clerk, U. S. Court of Appeals,
Fifth Circuit.

SEAL

Supreme Court of the United States

No. 766, October Term, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES H. WILKINSON

Order allowing certiorari

Filed June 15, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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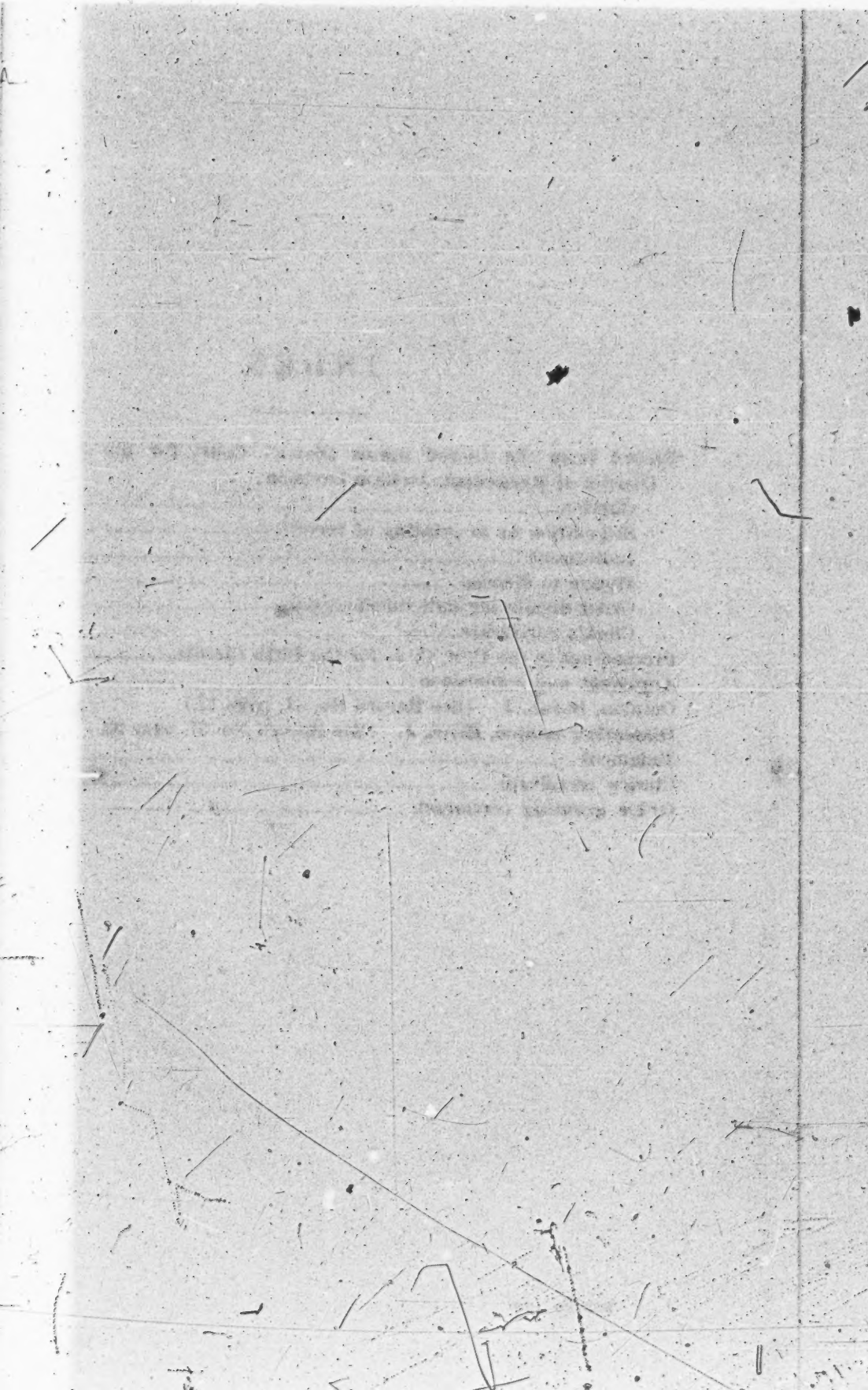

No._____

IN THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

UNITED STATES OF AMERICA, *Appellant*

vs

ROY F. BRASHIER, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI—JACKSON DIVISION

MEMORANDA FOR THE CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

No. 2167—CRIMINAL

UNITED STATES OF AMERICA, *Plaintiff*

v.

ROY F. BRASHIER, *Defendant*

HONORABLE JOSEPH E. BROWN, United States District Attorney, Federal Building Jackson, Mississippi

ATTORNEY FOR APPELLANT

HONORABLE J. ED FRANKLIN, Attorney at Law, 1411-12 Deposit Guaranty Bank Building, Jackson, Mississippi,

ATTORNEY FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14089

UNITED STATES OF AMERICA, *Appellant*

v

ROY F. BRASHIER, *Appellee*

STIPULATION AS TO PRINTING OF RECORD

Subject to the approval of the court, it is hereby stipulated and agreed by and between counsel for the parties that only the following portions of the record on appeal received from the Clerk of the District Court need be printed supplemented by this agreement:

1. The indictment.
2. The motion to dismiss, without exhibits.
3. It is agreed that the typewritten record certified by the Clerk of the District Court constitutes the record on appeal and shall be considered by the court to the same extent as if it were printed; and that any party may print, as a part of or in connection with its or his brief, any portion of said typewritten record or may comment upon or otherwise use said typewritten record to the same extent as if it were printed.
4. This stipulation.
5. The opinion of the District Court sustaining the motion to dismiss, the order of the District Court dismissing the indictment and the notice of appeal and filing thereof are identical with the same items in cause No. 14087 which portions of the record in said cause are adopted as a part of the record in this case.

/s/ Joseph E. Brown
United States Attorney
Southern District of Mississippi
Attorney for Appellant
/s/ J. Ed Franklin
Attorney for Appellee

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 2167—CRIMINAL

UNITED STATES OF AMERICA, *Plaintiff*

vs

ROY F. BRASHIER, *Defendant*

INDICTMENT

(FILED JULY 19TH, 1951)

THE GRAND JURY CHARGES:

1. That on or about the 10th day of April, 1951, at Jackson, and within the Southern District of Mississippi,

ROY F. BRASHIER,

The defendant herein, having duly taken an oath before a competent tribunal, to wit, a subcommittee of the Senate Committee on Expenditures in the Executive Departments, known as the Senate Subcommittee on Investigations, a duly created and authorized subcommittee of the United States Senate conducting official hearing in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and willfully, and contrary to said oath, state a material matter which he did not believe to be true, that is to say:

2. That at the time and place aforesaid, the said Senate Subcommittee inquiring as aforesaid was conduct-

ing a study and investigation of whether applicants for appointments to offices and places under the government of the United States had been, and were being solicited and required by numerous persons within the State of Mississippi to make political contributions and donations as a condition precedent to receiving such appointments, and as a consideration in return for promises to use their support and influence in obtaining said offices and places for applicants seeking appointment thereto; and to determine whether the laws of the United States had been violated in connection with such activities, the identity of any usch persons engaged therein, and the extent to which such improper and corrupt activities affected the operation of Federal agencies.

3. That at the time and place aforesaid, the defendant

ROY F. BRASHIER,

duly appearing as a witness before the Senate Subcommittee and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: Well, when you visited these men in the counties and made a proposition, what did you tell them you wanted them to do?

MR. BRASHIER: I told them I was setting up committeemen for each county, and there wasn't any pay in it at all, and they would get a letter, and anything that came up in that county, that they would be referred to either by telephone, or writing them, or wiring them, or something, from the Mississippi Democratic Committee.

It did not have anything to do with the OPS or the ESA, or whatever you call the other, I don't remember what they call it, it was in the paper, you see, some of them mentions that I contacted them on that, but so far as me telling about the OPS, it never was mentioned. I mean, they would mention it to me.

4. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that when he visited and contacted men in the various counties and talked to them about contributions to the Mississippi Democratic Committee he did discuss, mention, and tell them about OPS (Office of Price Stabilization), and certain offices, places, and jobs thereunder. (Sec. 1621, Title 18, U. S. C.)

COUNT II

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the First Count, the allegations of which are hereby incorporated herein, the defendant

ROY F. BRASHIER,

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before the said Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: Let's take it a step at a time. You told them they would be chairmen of the counties?

MR. BRASHIER: They would be committeemen building up the Democratic Party in each county in the State.

SENATOR HOEY: And you told them you wanted a contribution of how much?

MR. BRASHIER: I did not tell them how much. Anything they wanted to give, why, I would take it in.

2. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that he did in talking to numerous persons about being chairmen and committeemen in the various counties of the State of Mississippi tell them the amount of money he wanted them to contribute. (Sec. 1621, Title 18, U. S. C.)

COUNT III

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

ROY F. BRASHIER,

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before the said Senate Subcommittee with respect to the aforesaid material matter as follows:

> SENATOR McCLELLAN: And, as I understand it, you did not have to solicit any funds. Each one of them voluntarily suggested they wanted to make a contribution?
>
> MR. BRASHIER: That is right. I just told them they could give whatever they wanted to.

2. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that those with whom he talked concerning contributions and funds did not voluntarily suggest that they wanted to make a contribution. (Sec. 1621, Title 18, U. S. C.)

COUNT IV

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

ROY F. BRASHIER,

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before the said Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR McCLELLAN: I think you testified that you did not represent to them that they could appoint the personnel of these offices that were set up?

MR. BRASHIER: I said they could when it was set up.

SENATOR McCLELLAN: I am talking about this Price Control Office and rationing specifically.

MR. BRASHIER: I didn't know anything about it, I really didn't. They say they saw it in the paper.

SENATOR McCLELLAN: You did not represent that to them?

MR. BRASHIER: No, sir.

2. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that he did represent to various persons that they could appoint the personnel in the Price Control and Rationing offices that were to be set up. (Sec. 1621, Title 18, U. S. C.)

COUNT V

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

ROY F. BRASHIER,

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before said Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: Didn't you also tell them they could get their money back from the people they appointed?

MR. BRASHIER: No, sir. I never dreamed of that.

2. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that

he did tell persons with whom he discussed contributions that they could get their money back from the people they appointed to offices and places on the County Ration Boards and under the Office of Price Stabilization. (Sec. 1621, Title 18, U. S. C.)

COUNT VI

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

ROY F. BRASHIER,

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before said Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: I will ask you if you did not tell them there would be ten to fifteen employees to appoint?

MR. BRASHIER: No, sir.

2. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that he did tell persons with whom he discussed Office of Price Stabilization and County Ration Boards that they would have ten to fifteen employees to appoint. (Section 1621, Title 18, U. S. C.)

COUNT VII

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

ROY F. BRASHIER,

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified

falsely before said Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR MUNDT: Did you tell them that the position of supervisor of OPS was to be between 48 and 52 hundred dollars?

MR. BRASHIER: No, sir. I didn't know anything about that.

2. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that he did tell those with whom he discussed the position of Supervisor of OPS that the position of Supervisor was to be between 48 and 52 hundred dollars. (Sec. 1621, Title 18, U. S. C.)

COUNT VIII

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraps 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

ROY F. BRASHIER,

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before said Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: And that they could appoint them all?

MR. BRASHIER: No, Sir.

2. That the aforesaid testimony of the defendant as he then and there well knew and believed was untrue in that he did tell persons with whom he discussed positions as chairmen and supervisors of OPS County Ration Boards

that they, as chairmen and supervisors, could appoint all employees of said Boards. (Sec. 1621, Title 18, U. S. C.)

A TRUE BILL,
/s/ D. F. McCormick
Foreman

/s/ Joseph E. Brown
JOSEPH E. BROWN,
United States Attorney

/s/ Ben Brooks
BEN BROOKS
Special Assistant to the
Attorney General

(TITLE OMITTED)

MOTION TO DISMISS

(FILED SEPTEMBER 5, 1951)

The defendant moves that the indictment and each Count thereof be dismissed on the following grounds:

I.

The indictment does not state facts sufficient to constitute an offense *an offense* under Section 1621, Title 18 of the United States Code or under any other laws of the United States.

II.

Said indictment does not allege the essential elements of perjury, does not allege essential facts to support a verdict of perjury and does not sufficiently advise the defendant of the charge against him for his defense.

III.

The Senate Sub-Committee, before whom the alleged false answers were given, was not a competent tribune:

(a) The said Committee was making an investigation to ascertain if Section 215, Title 18, United States Code, which act is unconstitutional and not within the legislative powers of Congress and of no force and effect.

(b) No Committee of Congress has authority to determine whether the laws of the United States have been violated as alleged in the indictment.

(c) Neither Congress or any Committee of Congress has the power under the Constitution to investigate or examine private citizens of the United States to determine if they have violated the laws of the United States.

(d) The enforcement of the criminal laws of the United States is by the Constitution vested in the Executive Department, and all investigations or hearings to determine if such laws have been violated are vested in the Judicial Department and juries.

(e) Each and every question and in each Count of the indictment was directed to the defendant concerning which false answers are alleged to have been given was an inquiry by the Senate Committee as to whether Section 215, Title 18, United States Code, had been violated—being a statute prohibiting "acceptance or solicitation to obtain appointive public office." When said questions and answers without exception were propounded and the answers made as to the proposed appointment of persons named in the indictment to the office or place of County Chairman of Price Rationing Board, Office Price Stabilization, when no such office or place under the United States had been provided, set up, promulgated, at the time alleged in the indictment or since and the questions propounded and answers given were of and concerning an empty inquiry—a futile, void and useless inquiry and not the subject of perjury under the law.

IV.

The questions set out in the indictment and in each Count were propounded by the Senate Investigating Committee. In an investigation of and concerning the violation of Section 215, Title 18, United States Code, and as to whether or not the defendant had solicited contributions from persons under the promise to use his influence in having such person appointed Chairman of the County Ration Board for the county of his residence under Office

Price Stabilization, when there was no such office or place in existence nor has such been established since. The questions propounded and the answers made were not material to the inquiry.

V.

The interrogatories propounded and the alleged false answers given as shown by the indictment were made and given in a Senate Committee investigating the violation of Section 215, Title 18, United States Code for selling or soliciting the sales of public office or places under the United States; the defendant is under indictment in this court in Cause No. 2164 for conspiring to violate said law; that he cannot twice be put to trial on the same offense; that he cannot be put to trial for committing an offense against the United States and at the same time be held under indictment and put to trial for perjury for denying guilt. The two indictments are based upon the same facts with proof by the same witnesses and to require the defendant to go to trial on the indictment for perjury growing out of testimony in which he was required by the force of subpoena to give or be held in contempt of court would be placing him twice in jeopardy for the same offense.

VI.

The alleged false answers set out in the indictment were made in an investigation by the Senate Committee to determine if Section 215, Title 18, United States Code—a bribery statute had been violated. The answers alleged as false given by the defendant were in denial of the violation of said statute. The defendant is now under indictment for conspiracy to violate this Section in case No. 2164, on the Dockets of this court. The same facts by the same witnesses must support if at all both indictments. The defendant therefore cannot be put to trial for violating said Section 215 and at the same time he held and put to trial for perjury for denying guilt thereunder, when one of such charges is a misdemeanor and the other a felony. The defendant is subject to trial only for conspiracy to violate Section 215, and cannot be put to trial

for felony on the ground that his denial of guilt to misdemeanor is a felony.

/s/ J. Ed Franklin
ATTORNEY FOR DEFENDANT,
ROY F. BRASHIER
1411-12, Deposit Guaranty Bank Bldg.
Jackson, Mississippi

(TITLE OMITTED)

ORDER

(FILED FEBRUARY 11, 1952)

This cause this day came on for hearing on the motion to dismiss in the above numbered and entitled cause, and the Court having heard and considered same fully, it is considered and so

Ordered,

that the motion to dismiss in the above numbered and entitled cause be and the same hereby is sustained.

ORDERED, this the 6th day of February, 1952.

/s/ Allen Cox
UNITED STATES DISTRICT JUDGE

ENTERED: COB 5 P 978

CERTIFICATE

I, B. L. TODD, JR., CLERK or the United States District Court for the Soutnern District of Mississippi, do hereby certify that the foregoing pages contain a true and correct transcript of the record in the case of UNITED STATES OF AMERICA V ROY F. BRASHIER, CRIMINAL ACTION NO. 2167, now on appeal to the Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, as the same now remains of record in my office at Jackson, Mississippi.

Witness my hand and seal of this office, this the 29th day of April, 1952.

/s/ B. L. Todd, Jr.
B. L. TODD, JR., CLERK
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

(SEAL)

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of December 8, 1952.

UNITED STATES OF AMERICA,

No. 14089 versus

ROY F. BRASHIER.

On this day this cause was called, and after argument by Ben Brooks, Esq., Special Assistant to the Attorney General, for appellant, and Ben F. Cameron, Esq., for appellee, was submitted to the Court.

* * *

Judgment.

Extract from the Minutes of April 10, 1953.

UNITED STATES OF AMERICA,

No. 14089 versus

ROY F. BRASHIER.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives, Circuit Judge, dissents."

* * *

Clerk's Certificate.

UNITED STATES OF AMERICA.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 17 to 31 next preceding this certificate contain full, true and complete copies of the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 14089,

wherein UNITED STATES OF AMERICA is appellant, and ROY F. BRASHIER is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, numbered from 1 to 16 are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of April, A. D., 1953.

/s/ OAKLEY F. DODD
Clerk, U. S. Court of Appeals,
Fifth Circuit.

SEAL

☆U. S. GOVERNMENT PRINTING OFFICE 1953—252245/P.C.1550

Supreme Court of the United States

No. 767, October Term, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

ROY F. BRASHIER

Order allowing certiorari

Filed June 15, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

263720—53 U. S. GOVERNMENT PRINTING OFFICE: 1953

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203723—53

NO._____

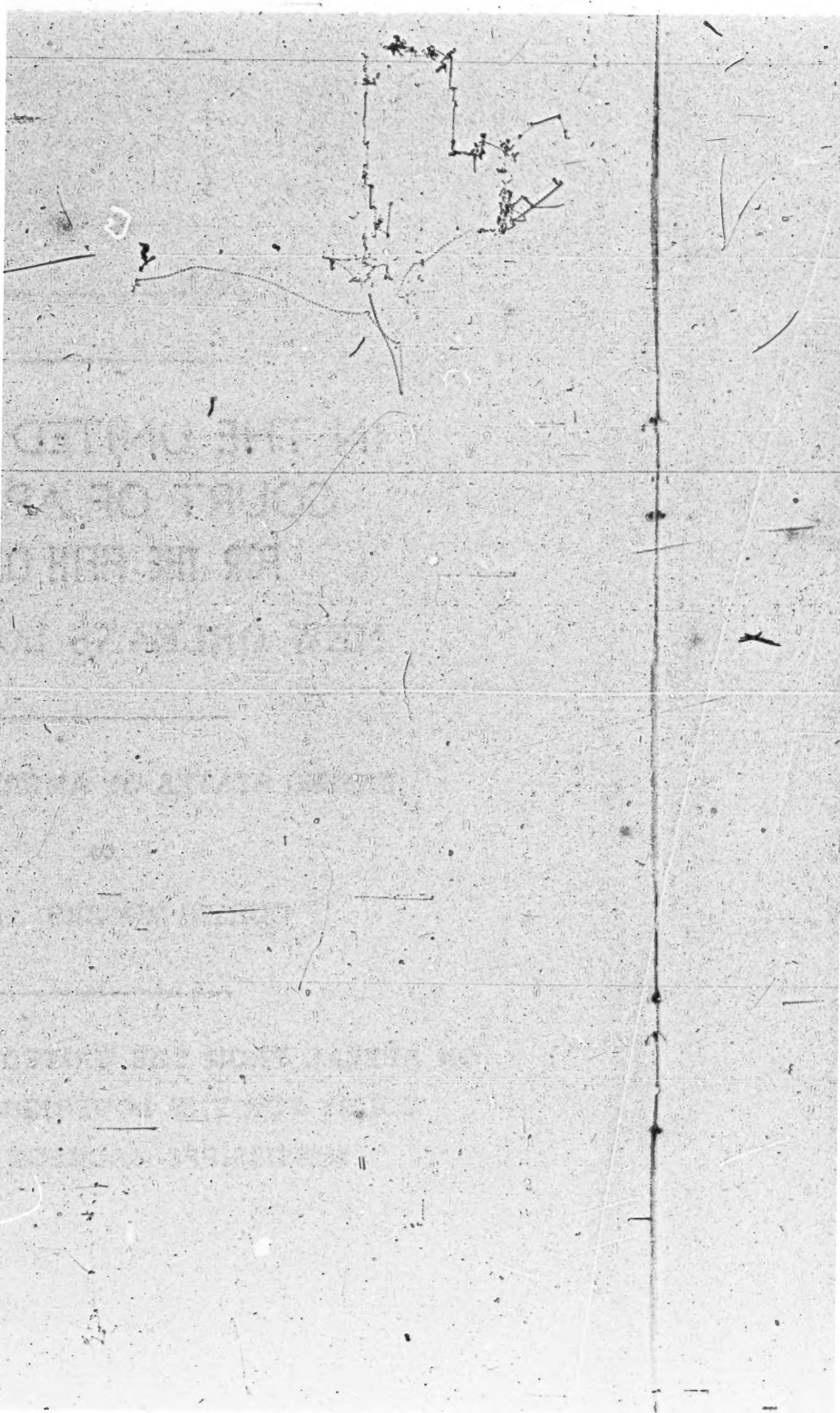
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT NEW ORLEANS LOUISIANA

UNITED STATES OF AMERICA, *Appellant*

vs

CURTIS ROGERS, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI—JACKSON DIVISION



MEMORANDA FOR THE CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 2168—CRIMINAL

UNITED STATES OF AMERICA

v

CURTIS ROGERS

HONORABLE JOSEPH E. BROWN, United States Attorney, Federal Building, Jackson, Mississippi,

ATTORNEY FOR APPELLANT

HONORABLE BIDWELL ADAM, Attorney at Law, Gulfport, Mississippi,

HONORABLE ALBERT SIDNEY JOHNSTON, JR. Attorney at Law, Biloxi, Mississippi,

ATTORNEYS FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14090

UNITED STATES OF AMERICA, *Appellant*

v.

CURTIS ROGERS, *Appellee*

STIPULATION AS TO PRINTING OF RECORD

Subject to the approval of the court, it is hereby stipulated and agreed by and between counsel for the parties that only the following portions of the record on appeal received from the Clerk of the District Court need be printed, supplemented by this agreement:

1. The indictment.
2. The motion to dismiss, without exhibits.
3. It is agreed that the typewritten record certified by the Clerk of the District Court constitutes the record on appeal and shall be considered by the court to the same extent as if it were printed; and that any party may print, as a part of or in connection with its or his brief, any portion of said typewritten record or may comment upon or otherwise use said typewritten record to the same extent as if it were printed.
4. This stipulation.
5. The opinion of the District Court sustaining the motion to dismiss, the order of the District Court dismissing the indictment and the notice of appeal and filing thereof are identical with the same items in cause No. 14087 which portions of the record in said cause are adopted as a part of the record in this case.

/s/ Joseph E. Brown
United States Attorney
Southern District of Mississippi
Attorney for Appellant

/s/ Albert Sidney Johnston, Jr.
Attorney for Appellee

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 2168—CRIMINAL

UNITED STATES OF AMERICA

v

CURTIS ROGERS

INDICTMENT

(FILED JULY 19, 1951)

THE GRAND JURY CHARGES:

1. That on or about the 9th day of April, 1951, at Jackson, and within the Southern District of Mississippi,

CURTIS ROGERS,

the defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments, known as the Investigations Subcommittee, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and willfully, and contrary to said oath, state a material matter which he did not believe to be true, that is to say:

2. That at the time and place aforesaid, the said Senate Subcommittee inquiring as aforesaid was conducting a study and investigation of whether applicants for appointments

to offices and places under the government of the United States had been, and were being solicited and required by numerous persons within the State of Mississippi to make political contributions and donations as a condition precedent to receiving such appointments, and as a consideration in return for promises to use their support and influence in obtaining said offices and places for applicants seeking appointment thereto; and to determine whether the laws of the United States had been violated in connection with such activities, the identity of any such persons engaged therein, and the extent to which such improper and corrupt activities affected and influenced the operation of Agencies and Departments of the United States.

3. That at the time and place aforesaid, the defendant

CURTIS ROGERS,

duly appearing as a witness before the Senate Subcommittee and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: There has been some testimony by different witnesses that you mentioned that you did not want checks, that you wanted the money in cash. What can you tell us about that?

MR. ROGERS: Senator, I would have been glad to get anybody that wanted to give a check,—I would take it if it was legitimate. I never made any statement like that in my life.

4. That the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that he did mention to various persons that he did not want checks and that he wanted the money in cash. (Sec. 1621, Title 18, U. S. C.)

COUNT II

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraph 1 and 2 of the first Count, the

allegations of which are hereby incorporated herein, the defendant

CURTIS ROGERS,

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before the Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: Did you suggest at any time to any applicants how much money they might contribute?

MR. ROGERS: No, Sir.

2. That the aforesaid testimony of the defendant, as he then and there well knew and believe, was untrue in that he did suggest to applicants how much they might contribute. (Sec. 1621, Title 18, U. S. C.)

A TRUE BILL
/s/ D. F. McCormick
Foreman

/s/ Joseph E. Brown
JOSEPH E. BROWN,
United States Attorney.

/s/ Ben Brooks
BEN BROOKS,
Special Assistant to the
Attorney General

(TITLE OMITTED)

MOTION TO DISMISS INDICTMENT

(FILED SEPTEMBER 5, 1961)

The defendant, Curtis Rogers, moves that the indictment and each count be dismissed on the following grounds:

1. The indictment and each count thereof does not state facts sufficient to constitute an offense against the United States.

2. The Count 1 of said indictment is indefinite, vague and uncertain, in that said indictment in said count does

not allege and charge or name the person or persons that the defendant mentioned he wanted the money in cash, and that he did not want checks.

3. The Count 2 of said indictment is indefinite, vague and uncertain, in that said indictment in said Count 2 does not allege and charge or name the applicants that the defendant suggested how much money they might contribute, and the amount to be contributed.

4. The Subcommittee of the United States Senate, known as the Investigations Sub-committee, which subpoenaed and examined this defendant, was without authority in law to administer an oath to this defendant.

5. The said indictment contains extraneous, inflammatory and prejudicial matter and allegations against this defendant, in addition to the attempt to charge perjury.

Name: /s/ Bidwell Adam
Address: Gulfport, Miss.

Name: /s/ Albert Sidney Johnson
Address: Biloxi, Miss.

(TITLE OMITTED)

ORDER

(FILED FEBRUARY 11, 1952)

This cause this day came on for hearing on the motion to dismiss in the above numbered and entitled cause, and the Court having heard and considered same fully, it is considered and so

Ordered,

that the motion to dismiss in the above numbered and entitled cause be and the same hereby is sustained.

ORDERED, this the 6th day of February, 1952.

/s/ Allen Cox
UNITED STATES DISTRICT JUDGE

ENTERED: COB 5—P 976

CERTIFICATE

I, B. L. TODD, JR., CLERK of the United States District Court for the Southern District of Mississippi, do hereby certify that the foregoing pages contain a true and correct transcript of the record in the case of UNITED STATES OF AMERICA V CURTIS ROGERS, CRIMINAL ACTION NO. 2168, now on appeal to the Court of Appeals for the Fifth Circuit, New Orleans, Louisiana, as the same now remains of record in my office at Jackson, Mississippi.

WITNESS my hand and seal of this office, this the 29th day of April, 1952.

/s/ B. L. Todd, Jr.
B. L. TODD, JR., CLERK
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of December 8, 1952.

UNITED STATES OF AMERICA,

No. 14090 versus

CURTIS ROGERS

On this day this cause was called, and after argument by Ben Brooks, Esq., Special Assistant to the Attorney General, for appellant, and Ben F. Cameron, Esq., for appellee, was submitted to the Court.

* * *

Judgment.

Extract from the Minutes of April 10, 1953.

UNITED STATES OF AMERICA,

No. 14090 versus

CURTIS ROGERS.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives, Circuit Judge, dissents."

* * *

Clerk's Certificate.

UNITED STATES OF AMERICA.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 10 to 24 next preceding this certificate contain full, true and complete copies of the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said court, numbered 14090, wherein UNITED STATES OF AMERICA is appellant, and CURTIS ROGERS is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 9, are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of April, A. D., 1958.

/s/ OAKLEY F. DODD
Clerk, U. S. Court of Appeals,
Fifth Circuit.

SEAL

Supreme Court of the United States

No. 768, October Term, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

CURTIS ROGERS

Order allowing certiorari

Filed June 15, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 55

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NO._____

IN THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA

UNITED STATES OF AMERICA, *Appellant*

versus

FORREST B. JACKSON, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FROM THE SOUTHERN DISTRICT OF MISSISSIPPI—JACKSON DIVISION

MEMORANDA FOR THE CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

No. 2169—CRIMINAL

UNITED STATES OF AMERICA

vs.

FORREST B. JACKSON

HONORABLE JOSEPH E. BROWN, United States Attorney, Federal Building, Jackson, Mississippi,

ATTORNEY FOR APPELLANT

CAMERON & CAMERON, Attorneys at Law, Threefoot Building, Meridian, Mississippi,

YOUNG & DANIEL, Attorneys at Law, Deposit Guaranty Bank Building, Jackson, Mississippi,

HONORABLE WILL S. WELLS, Attorney at Law, 513½ East Capitol Street, Jackson, Mississippi,

HONORABLE FRED C. BERGER, Attorney at Law, Natchez, Mississippi,

ATTORNEYS FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14091

UNITED STATES OF AMERICA, *Appellant*

v.

FORREST B. JACKSON, *Appellee*

STIPULATION AS TO PRINTING OF RECORD

Subject to the approval of the court, it is hereby stipulated and agreed by and between counsel for the parties that only the following portions of the record on appeal received from the Clerk of the District Court need be printed, supplemented by this agreement:

1. The indictment.
2. The motion to dismiss, without exhibits.
3. It is agreed that the typewritten record certified by the Clerk of the District Court constitutes the record on appeal and shall be considered by the court to the same extent as if it were printed; and that any party may print, as a part of or in connection with its or his brief, any portion of said typewritten record or may comment upon or otherwise use said typewritten record to the same extent as if it were printed.
4. This stipulation.
5. The opinion of the District Court sustaining the motion to dismiss, the order of the District Court dismissing the indictment and the notice of appeal and filing thereof are identical with the same items in cause No. 14087 which portions of the record in said cause are adopted as a part of the record in this case.

/s/ Joseph E. Brown
United States Attorney
Southern District of Mississippi
Attorney for Appellant
/s/ Ben F. Cameron
Attorney for Appellee

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 2169—CRIMINAL

UNITED STATES OF AMERICA

vs.

FORREST B. JACKSON

INDICTMENT

(FILED JULY 19, 1951)

COUNT I

THE GRAND JURY CHARGES:

1. That on or about the 9th day of April, 1951, at Jackson, and within the JACKSON Division of the Southern District of Mississippi,

FORREST B. JACKSON,

the defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Investigations Subcommittee, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to said oath, state a material matter which he did not believe to be true, that it to say:

2. That at the time and place aforesaid, the said Senate Subcommittee inquiring as aforesaid was conducting a study and investigation of whether applicants for appointments to offices and places under the government of the United States had been and were being solicited and required by numerous persons within the State of Mississippi to make political contributions and donations as a condition precedent to receiving such appointments, and as a consideration in return for promises to use their support and influence in obtaining said offices and places for applicants seeking appointment thereto; and to determine whether the laws of the United States had been violated in connection with such activities, the identity of any such persons engaged therein, and the extent to which such improper and corrupt activities influenced and affected the operation of Agencies and Departments of the United States.

3. That at the time and place aforesaid, the defendant,

FORREST B. JACKSON,

duly appeared as a witness before the Senate Subcommittee and then and there being under oath as aforesaid, testified falsely before said Sub-committee with respect to the aforesaid material matter as follows:

SENATOR HOEY: Did you have anything to do, Mr. Jackson, at any time with counseling anybody with reference to making a payment in exchange for which they would receive endorsements from any members of the committee for appointment to any office?

MR. JACKSON: I did not.

4. That the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that he did counsel and advise applicants for appointment to the office of rural mail carrier with reference to their making a payment and contribution in exchange for which they would receive endorsements from members of the Mississippi Democratic Committee. (Sec. 1621, Title 18, United States Code)

COUNT II

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant,

FORREST B. JACKSON,

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified falsely before the Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: Did you advise any of these applicants for office that it would be to their advantage to make a contribution, either to the dinners or to any representative of the party?

MR. JACKSON: I have no recollection of making any such statement, or giving any such advice to anyone who was an applicant for a position under appointment by the Federal Government.

2. That the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that he did advise with applicants for a position under appointment by the Federal Government that it would be to their advantage to make a contribution to some representative of the Party. (Sec. 1621, Title 18, U. S. C.)

COUNT III

THE GRAND JURY FURTHER CHARGES:

1. That at the time and place aforesaid, as is more fully set forth in Paragraphs 1 and 2 of the first Count, the allegations of which are hereby incorporated herein, the defendant

FORREST B. JACKSON,

duly appearing as a witness before the said Senate Subcommittee and being under oath as aforesaid, testified

falsely before the Senate Subcommittee with respect to the aforesaid material matter as follows:

SENATOR HOEY: Well now, was there any time that you had any discussion with any applicant for a position in which you advised him that as a consideration for getting the endorsement of the committee to make a contribution?

MR. JACKSON: No, sir, there was none, within my recollection.

2. That the aforesaid testimony of the defendant, as he then and there well knew and believed, was untrue in that he did have a discussion with an applicant for a position in which discussion he advised the applicant that as a consideration for getting the endorsement of the Mississippi Democratic Committee the applicant should make a contribution. (Sec. 1621, Title 18, U. S. C.)

A TRUE BILL,
/s/ D. F. McCormick
Foreman of the Grand Jury

/s/ Joseph E. Brown
JOSEPH E. BROWN,
United States Attorney

/s/ Ben Brooks
BEN BROOKS,
Special Assistant to the
Attorney General

(TITLE OMITTED)

MOTION TO DISMISS

(FILED SEPTEMBER 5, 1951)

Now come the defendant, Forrest B. Jackson, and moves the court to dismiss the above indictment returned and pending against him, and for grounds states:

FIRST

The said indictment fails to state an offense under Section 1621 of Title 18 of the United States Code, or under any other laws of the United States.

SECOND

The said indictment does not allege the essential elements of the crime of perjury, and does not allege essential and sufficient facts to support a verdict of guilty, and does not allege elements of the offense sufficiently to advise defendant in his defense.

THIRD

The Senate inquisitorial committee before whom the alleged false answers are alleged to have been given was not a competent tribunal.

(a) The said committee was making an investigation of offenses under Section 215 of Title 18, United States Code, which act is contrary to the Constitution of the United States and not within the legislative powers of Congress and of no force and effect.

(b) Neither the Congress of the United States nor any committee of either House thereof has authority to make an investigation to determine whether the laws of the United States have been violated, as alleged in the indictment.

(c) Congress or its committees have no power under the Constitution to make an investigation of or examine private citizens of the United States to determine whether they have violated any law of the United States.

(d) The enforcement of the laws of the United States is expressly vested by the Constitution in the Executive Department, and all hearings to determine whether the laws of the United States have been violated are vested in the Judicial Department and its Juries.

(e) The questions directed to the defendant as alleged in the indictment were questions calling for answers of confessions of guilt to violations of said Section 215 and of the bribery laws of the United States, or denials of guilt, as he answered, and that the mere question of guilt or innocence of the defendant of violations of the said bribery laws of the United States were not material to any investi-

gation that the said committee was authorized to make or that it had the power to make.

FOURTH

The three questions set out in the indictment and the alleged false answers show on the face of the indictment that they are questions calling for pleas of guilty and are not material to any alleged authorized investigation, and that whether the defendant answered that he was guilty or not guilty of violation of Section 215 or any other Section of Title 18 or criminal law of the United States was not material to any Congressional investigation; and that under his Constitutional rights to plead not guilty to any criminal charge under any law charging an offense or before any inquisitorial body, person or grand jury, the plea of either guilty or not guilty is not material to any possible hearing that could be made or held by such tribunal.

FIFTH

The answers given to questions in counts Two and Three are not statements of facts but statements of recollections based on memory and, as such, cannot be used as basis for perjury charge.

SIXTH

The questions propounded by the Committee and as set out in the indictment were charges of violation under Section 215 of Title 18, United States Code and the answers were denials of guilt and true in law.

SEVENTH

The questions set forth in the indictment and the answers alleged to be false are lifted from all the questions propounded by the said Senate Committee and the answers of the defendant, and from their context. All the questions to the defendant and his answers thereto show that all answers were full and responsive with full and complete disclosures as to all questions for facts, and were not false. No facts were concealed from the said Committee and no statement of fact is alleged to be false. The questions lifted

from the hearing were questions calling for an opinion of guilt or innocence based on disclosed facts by the defendant and the defendant's answer denying guilt were not false statements and were not wilfully false, and the said answers did not conceal, willfully or otherwise, any fact from the Committee. All of which is shown by the questions of the Committee and the answers of the defendant, and questions and answers are requested to be made a part of this motion by exhibit or by bill of particulars.

EIGHTH

The alleged false answers set out in the indictment herein were given in an investigation being held by the Senate Committee to determine whether the bribery laws of the United States had been violated, all as alleged in the indictment. The answers denying guilt of violation of the bribery laws of the United States were answers specifically denying guilt of violation of Section 215, the Section covered in the questions propounded to the defendant. The defendant has now been indicted under Section 215 of Title 18, and Conspiracy to violate said section, with the indictment pending in this court in cause number 2164, returned by the same grand jury. The two indictments are based upon the same facts with proof by the same witnesses. The defendant is indicted under Number 2164 herein for violation of the Bribery laws of the United States, Section 215, and Conspiracy to violate said law, and in this indictment with perjury for denying his guilt of said crimes; that he cannot twice be put to trial for the same offense; that he cannot be put to trial for commiting an offense against the United States and at the same time be held under indictment and put to trial for perjury for denying his guilt thereunder; that Section 215 of Title 18 of United States Code is a misdemeanor and the Congress of the United States has expressly limited the penalty that may be imposed under said section to a fine of not more than $1,000 or imprisonment for one year, or both, while violation of Section 1621 is a felony in which Congress has provided that the penalty may be a fine of $2,000 and imprisonment for five years. In addition conviction on perjury carries

penalties not set out in said section. The defendant is subject to trial only under Section 215 or conspiracy to violate said section, and cannot be tried for felony on ground that his denial of guilt to misdemeanor is a felony.

/s/ Cameron & Cameron
/s/ Young & Daniel
/s/ Fred C. Berger
/s/ Will S. Wells
ATTY. FOR DEFT.: FORREST B. JACKSON
By /s/ Will S. Wells, of Counsel

(TITLE OMITTED)

ORDER

(FILED FEBRUARY 11, 1952)

This cause this day came on for hearing on the motion to dismiss in the above numbered and entitled cause, and the Court having heard and considered same fully, it is considered and so

Ordered,

that the motion to dismiss in the above numbered and entitled cause be and the same hereby is sustained.

ORDERED this 6th day of February, 1952.

/s/ Allen Cox
UNITED STATES DISTRICT JUDGE

ENTERED: COB 5—P 977

CERTIFICATE

I, B. L. TODD, JR., CLERK of the United States District Court for the Southern District of Mississippi, do hereby certify that the foregoing pages contain a true and correct transcript of the record in the case of UNITED STATES OF AMERICA V. FORREST B. JACKSON, CRIMINAL ACTION NO. 2169, now on appeal to the Court of Appeals at New Orleans, Louisiana, Fifth Circuit, as the same now remains of record in my office at Jackson, Mississippi.

This the 29th day of April, 1952.

/s/ B. L. Todd, Jr.
B. L. TODD, JR., CLERK
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz.:

Argument and Submission.

Extract from the Minutes of December 8, 1952.

UNITED STATES OF AMERICA,

No. 14091 — versus

FORREST B. JACKSON.

On this day this cause was called, and after argument by Ben Brooks, Esq., Special Assistant to the Attorney General, for appellant, and Ben F. Cameron, Esq., for appellee, was submitted to the Court.

* * *

Judgment.

Extract from the Minutes of April 10, 1953.

UNITED STATES OF AMERICA,

No. 14091 versus

FORREST B. JACKSON.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives, Circuit Judge, dissents."

* * *

Clerk's Certificate.

UNITED STATES OF AMERICA.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 14 to 28, next preceding this certificate contain full, true and complete copies of the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 14091,

wherein UNITED STATES OF AMERICA is appellant, and FORREST B. JACKSON is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, numbered from 1 to 13 are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of April, A. D. 1953.

/s/ OAKLEY F. DODD,
Clerk, U. S. Court of Appeals,
Fifth Circuit.

SEAL

Supreme Court of the United States

No. 769, October Term, 1952

UNITED STATES OF AMERICA, PETITIONER

v.

FORREST B. JACKSON

Order allowing certiorari

Filed June 15, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FORREST B. JACKSON

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that writs of certiorari

issue to review the judgments of the United States Court of Appeals for the Fifth Circuit affirming the judgments dismissing the indictments.

OPINION BELOW

The majority and dissenting opinions in the Court of Appeals (R. 18–25)[1] are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on April 10, 1953 (R. 25). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the failure of a perjury indictment to allege the name of the person who administered the oath for an admittedly competent tribunal and that he had authority to administer the oath renders the indictment subject to dismissal for failure to state an offense.

STATUTES AND RULE INVOLVED

The pertinent statutes and Federal Rule of Criminal Procedure provide:

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[1] There is a separate record for each case. However, since the issue is the same in each case, and the court below wrote one opinion for all, references will be made only to the Debrow record, the only one in which the opinion appears. The judgments of the Court of Appeals appear at the following pages in the other records: Wilkinson, p. 19; Brashier, p. 17; Rogers, p. 11; Jackson, p. 15.

18 U. S. C. 1621:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

Section 5396, Revised Statutes, 2d ed. (18 U. S. C. [1940 ed.] 558), repealed by the Act of June 25, 1948, revising the Criminal Code (62 Stat. 683, 862):

> In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, * * * without setting forth the commission or authority of the court or person before whom the perjury was committed.

Rule 7 (c):

> NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * * It need not contain * * * any other matter not necessary to such statement. * * *

STATEMENT

Separate indictments were returned against respondents in July 1951 in the United States District Court for the Southern District of Mississippi charging violations of 18 U. S. C. 1621, *supra*, pp. 2–3 (R. 5–9). The pertinent portion of each indictment charged in identical language that in April 1951 (R. 5),

> the defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Investigations Subcommittee, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to s. d oath, state a material matter which he did not believe to be true * * *.

Prior to trial, respondents moved to dismiss the indictments on the general grounds, *inter alia*, that they did not state an offense under 18 U. S. C. 1621 and did not state the essential elements of a perjury charge. Specifically, during oral argument before the District Court, respondents urged that the indictments were defective in the foregoing respects because they failed to allege the name of the officer who administered the oath and by what authority he acted. (R. 9–11). The District Court dismissed the indictments (R. 11). Relying on the decision of the Court of Appeals for the Fifth Circuit in *Hilliard* v. *United States*, 24 F. 2d 99, and on the provisions of Section 5396, Revised Statutes, 2d ed. (18 U. S. C. [1940 ed.] 558), it decided that allegations as to "who administered the oath and by what authority he acted" were essential elements of a perjury charge (R. 12–13).

On appeal, the Court of Appeals, with one judge dissenting, affirmed the judgments of the District Court, holding that "it is essential to inform the accused by whom it is charged that he was sworn, either by disclosing the name of the person administering the oath, or his official capacity and that he was in fact possessed of the requisite authority." (R. 21.) In so doing, the Court of Appeals referred to the provisions of R. S. 5396, in effect regarding the statute, even though repealed, as embodying the essential elements of the offense. It rejected the Government's contention

that the indictments complied with the provisions of Rule 7 (c), F. R. Crim. P., that an indictment "be a plain, concise and definite written statement of the essential facts."

The dissenting judge, in agreement with the Government's position, considered the majority holding "extremely technical" and "contrary to the letter and spirit of the pertinent Federal Rules of Criminal Procedure" (R. 23). In the dissenting judge's opinion, the allegation that respondents had "*duly* taken an oath before a competent tribunal" was a sufficient recitation of the essential facts required under Rule 7 (c), and the name and authority of the person administering the oath were merely details which were matters for proof on the trial (R. 24–25).

REASONS FOR GRANTING THE WRIT

In dismissing the indictments for failure to allege the name of the person who administered the oath and that he had authority to do so the decision below invalidates a form of perjury indictment which has been in general use since the repeal of R. S. 5396 (*supra*, p. 3) by the Act of June 25, 1948, revising the Criminal Code (62 Stat. 683). *E. g., United States* v. *Moran*, 194 F. 2d 623 (C. A. 2), certiorari denied, 343 U. S. 965; *United States* v. *Weber*, 197 F. 2d 237 (C. A. 2), certiorari denied, 344 U. S. 834; and *United States* v. *Hiss*, 185 F. 2d 822 (C. A. 2), certiorari denied, 340 U. S. 948. The present cases are the

first, so far as we know, in which this form of indictment has even been questioned during that time. The decision below brings into question the validity of the indictments in a number of current perjury prosecutions in the District of Columbia; *United States* v. *Rosenbaum*, No. 1722–51; *United States* v. *Robert W. Dudley*, No. 1724–51; *United States* v. *Herschel Young*, No. 1725–51; *United States* v. *E. Merl Young*, No. 355–53; *United States* v. *Lattimore*, No. 2879–52.[2] By the same token, it has injected an element of uncertainty as to the proper form of perjury indictments in other districts outside the Fifth

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[2] In the *Rosenbaum*, *Dudley* and two *Young* cases, pretrial motions like the ones in the instant cases were denied. The two Youngs have been convicted after jury trials. The *Rosenbaum* and *Dudley* cases have not yet been tried. In the *Lattimore* case, the District Court has under consideration a similar pretrial motion. In the *E. Merl Young* case, District Judge McGuire, on April 29, 1953, overruled a motion for a new trial which invoked the intervening decision of the Fifth Circuit in the instant cases. In his opinion, Judge McGuire stated that he found that decision "neither controlling nor persuasive" and that the dissenting judge below "has stated the law as it is today, at least in the Federal courts, and he has both reason and basic common sense on his side." Judge McGuire reached this conclusion notwithstanding that the District of Columbia Code (Title 23, § 204) still contains a provision like R. S. 5396. He did not regard this provision as requiring that the indictment set forth the name of the person before whom the oath was taken and his authority to administer the oath, and held that, in any event, any such requirement was superseded by Rule 7 (c) of the Rules of Criminal Procedure.

A similar post-conviction motion is pending in the *Herschel Young* case.

Circuit. Beyond this, by reaching back to a repealed statute (R. S. 5396, *supra*, p. 3, which required a perjury indictment to allege "before whom the oath was taken") to determine the sufficiency of an indictment as a pleading, the holding below has imported into modern criminal pleading outworn technical concepts which the Rules of Criminal Procedure were intended to abolish.

The decision below is, moreover, basically in conflict with the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Bickford*, 168 F. 2d 26, and represents a serious departure in principle from the decisions of this Court and of other courts of appeals as to the standards governing the validity of criminal indictments. See particularly *Roberts* v. *United States*, 137 F. 2d 412 (C. A. 4), certiorari denied, 320 U. S. 768, and *United States* v. *Polakoff*, 112 F. 2d 888, 890 (C. A. 2), discussed *infra*, pp. 12–13.

In the *Bickford* case, the court held sufficient an indictment for perjury, returned during the period between the promulgation of the Rules of Criminal Procedure in 1946 and the repeal of R. S. 5396 in 1948, in which it was alleged that a witness before a district court had taken an oath before the clerk of the court, even though there was no allegation that the clerk had authority to administer an oath. The court held that, since the authority of the clerk was implicit in the facts alleged, the indictment was sufficient to meet the

requirements of R. S. 5396; that, in any event, that statute must be regarded as having been superseded by Rule 7 (c) of the Rules of Criminal Procedure; and that since the indictment clearly alleged facts sufficient to inform the defendant of the acts with which he was charged and to protect him from a second prosecution for the same offense, it must be deemed sufficient under Rule 7 (c) and under the standards established by this Court in *Hagner* v. *United States*, 285 U. S. 427, 431, and *Berger* v. *United States*, 295 U. S. 78. See also *Glasser* v. *United States*, 315 U. S. 60, 66.

These conclusions are equally applicable in the present cases. Here, as in *Bickford*, the indictments amply apprised respondents of the crime charged; here, as in that case, the specific allegations—of an oath "duly" administered before a "competent tribunal"—clearly charged the taking of a proper oath, necessarily implying administration of the oath by an authorized person. Here, however, although by the time of the indictments, R. S. 5396 had been expressly repealed by Congress in the 1948 revision of the Criminal Code, the court below, contrary to the *Bickford* case, looked to that statute to determine the "essential facts" necessary to sustain a perjury indictment, and in so doing disregarded the mandate of Rule 7 (c) and the decisions of this Court referred to above.

Rule 7 (c) was adopted to simplify the language in indictments and eliminate technicalities. It provides in pertinent part that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged" and need not contain any matter not necessary to such statement. The very essence of such simplification is to discourage the pleading of great detail. See Holtzoff, *Reform of Federal Criminal Procedure,* 3 F. R. D. 445, 448–449; *United States* v. *Bickford,* 168 F. 2d 26, 27 (C. A. 9); *Hart* v. *United States,* 131 F. 2d 59–61 (C. A. 9).

As the dissenting judge pointed out, the questioned portion of the indictments in the instant cases meets the requirements of both the letter and spirit of Rule 7 (c). Insofar as the oath is concerned, all that the perjury statute requires is that the defendant take "an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered." 18 U. S. C. 1621; see also *United States* v. *Norris,* 300 U. S. 564, 574; *United States* v. *Seavey,* 180 F. 2d 837, 839 (C. A. 3), certiorari denied, 339 U. S. 979; *Fotie* v. *United States,* 137 F. 2d 831, 840 (C. A. 8). Here, each indictment stated that the defendant had "duly taken an oath before a competent tribunal, to wit, a subcommittee of the Senate Committee on Expenditures in the Executive Department, a duly created and authorized subcom-

mittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered." Accordingly, each indictment clearly and categorically, and in more detail than was necessary under Rule 7 (c), named the body before which the oath was taken and alleged that such body was a competent tribunal inquiring into a matter in which an oath was authorized to be administered. In addition, each stated that the oath was *duly* taken, which indicates that the oath was administered properly, that is, by a person with authority to administer it.

It is, of course, still essential under Rule 7 (c) and the perjury statute that the indictment allege that the oath was taken before proper authority. If the oath was taken before a court, the particular court should be specified; if before a tribunal of some other kind, the nature of the tribunal and its authority; and if before a person, his official capacity and authority. Where the oath is before a tribunal rather than a particular person, and the authority of the tribunal to administer oaths is alleged, the particular person who administered the oath for the tribunal becomes an insignificant detail, particularly where, as here, the competency and authority of the tribunal to administer oaths through its members is well es-

tablished.[3] The name of the officer who administered the oath is a detail of proof at the trial which, if it has any bearing on the defense, can be obtained by a motion for a bill of particulars. The omission of such a detail cannot be said to prejudice a defendant or make his defense more difficult. Certainly it does not render the indictment insufficient to inform the accused of the nature of the offense or to protect him from future prosecution for the same charge—the true test by which, under the decisions of this Court, the validity of an indictment must be judged. *Glasser* v. *United States*, 315 U. S. 60, 66; *Hagner* v. *United States*, 285 U. S. 427, 431; see also *United States* v. *Marcus*, 166 F. 2d 497, 500–501 (C. A. 3); *Todorow* v. *United States*, 173 F. 2d 439, 446–447 (C. A. 9), certiorari denied, 337 U. S. 925.

In comparable situations, the courts have held that the name of a particular person is not an essential fact which must be alleged in an indictment. Thus, in *Roberts* v. *United States*, 137 F. 2d 412, 414 (C. A. 4), certiorari denied, 320 U. S. 768, the court held that an indictment under the false claims statute (18 U. S. C. (1946 ed.) 80) which alleged that the claim had been presented to the Navy Department was sufficient with-

[3] It is clear that a Senate investigating committee appointed and authorized to inquire and take testimony under oath is a competent tribunal and that Members of Congress are authorized to administer oaths to witnesses in any matter pending in any congressional committee. *United States* v. *Norris*, 300 U. S. 564, 573; 2 U. S. C. 191.

out an allegation specifying the authority of the officer to whom the claim was presented and his authority to pay the claim. In *United States* v. *Polakoff*, 112 F. 2d 888, 890 (C. A. 2), an allegation that the accused conspired "to influence and impede the official actions of officers in and of the United States District Court" was held sufficient although the indictment did not allege who the officers were that were to be so impeded. The court said, "we do not see why, if the accused were really in ignorance of this detail, they could not have been fully protected by a bill of particulars." In both these decisions, the courts disregarded earlier decisions of a more technical period in which the name had been held to be essential. While technically distinguishable, these decisions are basically inconsistent with the decision below. Unless the clear standards of adequate notice and prevention of double jeopardy are to prevail in determining whether the essential facts have been alleged under Rule 7 (c), the basic purpose of the Rule will be frustrated.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

APRIL 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 17-25)[1] are reported at 203 F.

[1] Each case has a separate record, but since all the cases involved a single and common ground, the court below wrote one

2d 699. The opinion of the District Court (R. 12-14) is not reported.

JURISDICTION

The judgments of the Court of Appeals were entered on April 10, 1953 (R. 25).[2] The petition for writs of certiorari was filed on April 30, 1953 and was granted on June 15, 1953 (R. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the failure of a perjury indictment to state the name of the person who administered the oath for an allegedly competent tribunal, and that he had authority to administer the oath, renders the indictment subject to dismissal for failure to state an offense.

STATUTES AND RULE INVOLVED

The pertinent statutes and Federal Rule of Criminal Procedure provide:

18 U.S.C. 1621:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, depo-

opinion covering all five cases. Accordingly, the opinion was printed only in the *Debrow* case and reference will be made to that record only.

[2] The judgments in other than the *Debrow* record appear at the following pages: Wilkinson, p. 19; Brashier, p. 17; Rogers, p. 11, and Jackson, p. 15.

sition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

Section 5396, Revised Statutes (18 U.S.C. [1940 ed.] 558), repealed by the Act of June 25, 1948, revising the Criminal Code (62 Stat. 683, 862):

> In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed.

Rule 7 (c) F.R. Crim. P.:

> NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * * It need

not contain * * * any other matter not necessary to such statement. * * *

STATEMENT

In July, 1951, in the United States District Court for the Southern District of Mississippi, separate indictments were returned against respondents charging them with perjury violations under 18 U.S.C. 1621, *supra*, pp. 2-3 (R. 5-9). In pertinent respects the indictments were identical and charged as follows (R. 5):

> The defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Subcommittee on Investigations, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to said oath, state a material matter which he did not believe to be true, * * *

Prior to trial, respondents moved to dismiss the indictments on the ground, *inter alia*, that the indictments, in failing to allege the name of the person who administered the oath and that he had authority to administer said oath, omitted some of the

essential elements of perjury (R. 9-11).[3] The District Court dismissed the indictments (R. 11). Despite its recognition that the provisions of Section 5396, Revised Statutes (18 U.S.C. [1940 ed.] 558) were no longer a part of our federal statutory law, the District Court, relying upon that statute and upon the decision of the Court of Appeals for the Fifth Circuit in *Hilliard v. United States*, 24 F. 2d 99, decided that allegations as to "who administered the oath and by what authority he acted" are still essential elements of a perjury charge (B. 12-14).

On appeal, the Court of Appeals, with one judge dissenting, affirmed the judgments of the District Court (R. 25). Holding that the repeal of Section 5396 did not change the fundamental rule that "every * * * essential element of the offense sought to be charged must * * * be alleged in the indictment," the court concluded that "it is essential to inform the accused by whom it is charged that he was sworn, either by disclosing the name of the person administering the oath, or his official capacity, and that he was in fact possessed of the requisite authority" (R. 21).

The dissenting judge, in agreement with the Gov-

[3] All except respondent Wilkinson raised the question generally in their written motions to dismiss. Wilkinson's motions did not raise this question. But in oral arguments before the court each of the respondents attacked the indictments specifically on the ground stated above.

In the *Rogers* record, the motion to dismiss appears at pp. 7-8; *Jackson*, pp. 8-12; *Brashier*, pp. 12-15; and *Wilkinson*, pp. 11-13.

ernment's position, considered the majority holding "extremely technical" and "contrary to the letter and spirit of the pertinent Federal Rules of Criminal Procedure" (R. 23). In the dissenting Judge's opinion, the allegation that respondents had "*duly* taken an oath before a competent tribunal" was a sufficient recitation of the essential facts required under Rule 7 (c), and the name and authority of the person administering the oath were merely details which were matters for proof on the trial (R. 24-25).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1) In ruling that the indictments were insufficient by reason of their failure to state the names of the persons who administered the oaths and the authority by which they acted; and

2) In dismissing the indictments.

SUMMARY OF ARGUMENT

A perjury indictment which alleges that an oath was duly taken before a named competent tribunal authorized by law to administer oaths fully informs the accused of the nature of the crime charged, as required by the VI Amendment and clearly states the "essential facts constituting the offense charged" as required by Rule 7 (c) of the Rules of Criminal Procedure. Under the rulings of this Court in *Hagner* v. *United States*, 285 U.S. 427, and other cases, the indictments in this case were therefore sufficient.

One of the essential elements in the crime of perjury is that an oath must have been taken before a

tribunal *or* person having authority to administer oaths in the matter involved. A perjury indictment must, therefore, identify the tribunal or person involved and allege its or his authority to administer the oath. This these indictments did by naming the Congressional Committee and asserting its authority by law to administer oaths. *United States* v. *Norris*, 300 U.S. 564. Since here the authority was vested in a tribunal, the name of the officer giving the oath did not have the significance it would have had if the perjury had been alleged to have occurred before an individual. There his name and authority would have been essential. *United States* v. *Bickford*, 168 F. 2d 26 (C.A. 9).

Under the simplified indictments contemplated by Rule 7 (c) of the Federal Rules of Criminal Procedure, it was clearly not necessary to allege more than the essential facts of the offense. But these indictments, which followed the language of the perjury statute and then supplied additional identifying facts, would have been sufficient even in the absence of the Rule. *Markham* v. *United States*, 160 U.S. 319. Certainly they were sufficient to inform the defendants of the offense charged so that they could defend themselves, and the facts were set forth with sufficient certainty to protect the defendants against another prosecution for the same offense. In comparable situations, the names of officials have not been required to be stated. *Roberts* v. *United States*, 137 F. 2d 412 (C.A. 4), certiorari denied, 320 U.S. 768; *United States* v. *Polakoff*, 112 F. 2d 888 (C.A. 2).

The reliance of the court below on its prior decision in *Hilliard* v. *United States*, 24 F. 2d 99 (C.A. 5), was not well placed. That decision was rendered while Section 5396 of the Revised Statutes was still in effect. That Section provided that in a perjury indictment it would be sufficient to set forth "by what court, *and* before whom the oath was taken [italics added]." In a dictum in the *Hilliard* case it was indicated that under that provision both the tribunal and the officer must be named. However, that Section has since been repealed and has no effect at the present time unless it recognized a pre-existing rule that both the court and its agent must be named. However, both the English statute from which it was derived (23 George II, Chap. 11, 20 Eng. Stat. 11) and our own Crimes Act of 1790 (1 Stat. 112, 116), which was its immediate ancestor, used the disjunctive pronoun "or" so that they read "by what court, *or* before whom" the oath was taken. In fact R.S. 5396 was itself generally so construed by the district courts. In any event, if it did change the law, it has been repealed and there is no present requirement that such an allegation be included in perjury indictments.

ARGUMENT

An Indictment Which Alleges That an Oath Was Duly Taken Before a Competent Tribunal, Setting Forth Its Name and Authority, Does Not Fail to State Essential Elements of the Offense of Perjury by Omitting to Name the Officer Administering the Oath and His Authority to Do So.

In order for an indictment to be sufficient it must inform the defendant "of the nature and cause of

the accusation" pursuant to the VI Amendment of the Constitution and must state "the essential facts constituting the offense charged" as required by Rule 7 (c) of the Federal Rules of Criminal Procedure, *supra*, pp. 3-4. This Court has stated in *Hagner* v. *United States*, 285 U.S. 427, 431:

> The true test of the sufficiency of an indictment is not whether it could have been more definite and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Cochran and Sayre* v. *United States*, 157 U.S. 286, 290; *Rosen* v. *United States*, 161 U.S. 29, 34.

The issue in the present cases is not really the definiteness of the allegations included, but whether sufficient allegations were made to comprise all the elements of the crime involved. The essential elements of perjury are found in 18 U.S.C. 1621, *supra*, pp. 2-3, which defines the crime. They are (1) that an oath has been administered "before a competent tribunal, officer, *or* person" (italics added); (2) that false statements have been wilfully made; and (3) that the statements were material to the matter under investigation. *Markham* v. *United States*, 160 U.S. 319; *United States* v. *Norris*, 300 U.S. 564. There being no dispute that elements (2) and (3) were alleged in the indictments here involved, no further consideration will

be given to them. The sole issue is whether th indictments contained sufficient allegations wit respect to the oath when they alleged (R. 5) that

> * * * defendant herein, having duly take an oath before a competent tribunal, to wit: subcommittee of the Senate Committee o Expenditures in the Executive Department known as the Subcommittee on Investigations a duly created and authorized subcommittee o the United States Senate conducting officia hearings in the Southern District of Missis sippi, and inquiring in a matter then and ther pending before the said subcommittee in whic a law of the United States authorizes that a oath be administered, that he would testif truly, did unlawfully, knowingly and wilfully and contrary to said oath, state a material mat ter which he did not believe to be true * * *

A. *The Indictments State the Essential Element of the Offense*

On its face each indictment here involved allege the essential elements as to the taking of the oat and the authority of the tribunal to administer i Each indictment alleged that the defendant dul took an oath, before a competent tribunal, i. e. named Senate subcommittee, and that said sub committee was then inquiring into a matter pend ing before it in which an oath was authorized to b administered. These facts clearly show that a oath was charged to have been taken before named competent tribunal authorized to adminis ter oaths, since a Senate investigating committe

appointed and authorized to inquire and take testimony under oath, is a competent tribunal, and members of Congress are authorized to administer oaths to witnesses in any matter pending in any congressional committee. *United States* v. *Norris*, 300 U.S. 564, 573; *Meyers* v. *United States*, 171 F. 2d 800 (C.A. D.C.), certiorari denied, 336 U.S. 912; 2 U.S.C. 191.[4]

In this connection, it should be noted that 18 U.S.C. 1621 provides in the alternative that an oath be taken "before a competent tribunal, officer, *or* person," thereby in terms requiring only that an oath be administered before one of the three enumerated authorities. Accordingly under the statute, where the oath is taken before a tribunal or court, only the name of the tribunal or court must be alleged; where it is taken before a person such as a notary public or a justice of the peace, then the name or identity of the person administering the oath is important and must be alleged.[5] The rationale behind this distinction is valid. Where an

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[4] If the cases had gone to trial, the government would have had to prove the facts alleged. The transcript of the hearings before the Senate Committee indicates that the Government would have submitted evidence in one form or another to show that Senator Hoey administered the oath in each instance. See Hearings before the Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments on Activities of the Mississippi Democratic Committee pursuant to S. Res. 51, 82d Cong., 1st Sess., pages 70, 298, 284, 371 and 42.

[5] The respondents, in their restatement of the question involved in their brief in opposition, appear to recognize this distinction as to courts (Br. in Opp. 1-2). They do not explain why a Senate committee or other competent tribunal should be treated differently.

oath is taken before a person who is not a member of a court or tribunal, an allegation that such person administered the oath is the only way that the authority before whom the oath was taken can be identified. This is not true where an oath is taken before a competent body. The majority opinion below, by requiring the name or official capacity of the person who administered the oath to be alleged even where an oath was administered before a competent body ignores the plain distinction made by the alternative language of the statute.

Rule 7(c) provides that "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged" and that it "need not contain * * * any other matter not necessary to such statement." This rule which became effective on March 21, 1946 (Rule 59, F. R. Crim. P.), unquestionably applies to indictments for perjury. *United States* v. *Bickford*, 168 F. 2d 26 (C.A. 9); 4 Barron, *Federal Practice and Procedure*, Section 1914, pp. 69-70; cf. *United States* v. *Starks*, 6 F.R.D. 43 (S.D. N.Y.).

As indicated by the Advisory Committees' notes, the purpose of the Rule was to "introduce a simple form of indictment" which would allege only those facts necessary to establish the offense. See Arthur T. Vanderbilt, *New Rules of Federal Criminal Procedure*, 29 A.B.A.J. 376-377. The result to be achieved can be seen in Judge Alexander Holtzoff's article entitled *Reform of Federal Criminal Procedure*, 3 F.R.D. 445, 448-449, where he

sets forth an example of a murder indictment drafted prior to the adoption of the new rules and the same offense as it should be alleged under Rule 7(c). It will be seen that a thirty-five line indictment under the old procedure is reduced to four lines. The latter indictment, Judge Holtzoff concludes, is a good indictment under the present rules, which does not in any way cut down on the necessary allegations but which merely eliminates useless embellishments.

The simplified form of indictment of necessity requires the use of general terms to express ultimate facts. This was, however, permissible even before the adoption of the Federal Rules of Criminal Procedure and even under the old English law. *Brown* v. *United States*, 143 Fed. 60 (C.A. 8), certiorari denied, 202 U.S. 620. For example, in perjury indictments an allegation that the false statement was material without the pleading of facts from which this conclusion was drawn, was considered entirely proper and adequate. *Markham* v. *United States*, 160 U.S. 319; *Travis* v. *United States*, 123 F. 2d 268 (C.A. 10); 2 Chitty's *Criminal Law* (1847), p. 307; 4 Blackstone's *Commentaries*, Section 137, fn. 50. Consequently here the use of the words "duly" and "competent" in that portion of the indictment reading "having duly taken an oath before a competent tribunal," although generalizations by the pleader, are perfectly proper under Rule 7(c). As it happens, as shown above, the instant indictments contained more than just these conclusions.

By its terms, Rule 7(c) requires a pleading only of the substance of the offense. Generally, indictments framed merely in the language of the statute which charge the offense have been held sufficient. *United States* v. *Brig Neurea*, 19 How. 92, 94; *Smiley* v. *United States*, 181 F. 2d 505 (C.A. 9), certiorari denied, 340 U.S. 817-818; *Wendell* v. *United States*, 34 F. 2d 92, 93 (C.A. 4), certiorari denied, *sub nom. Leikin* v. *United States*, 280 U.S. 589. Here, the indictments contain more than the language of the statute.

The indictments here in every respect meet the basic requirements of a good indictment; they state facts sufficient to inform respondents of the offense with which they are charged so that they can properly defend themselves, and they do this with sufficient certainty to protect defendants against another prosecution for the same offense. *Berger* v. *United States*, 295 U.S. 78; *Hagner* v. *United States*, 285 U.S. 427, 431; *Hopper* v. *United States*, 142 F. 2d 181 (C.A. 9). As the dissent below said (R. 25), the failure to allege the name of the committee member who administered the oath can hardly be said to have prejudiced respondents or to have "made their defenses more difficult." The name of the officer who administered the oath is a detail of proof which need not be set forth in the indictment. Cf. *Olmstead* v. *United States*, 29 F. 2d 239 (C.A. 9), certiorari denied, 279 U.S. 849; *United States* v. *Polakoff*, 112 F. 2d 888, 890 (C.A. 2). If additional facts are required by a defendant in order to prepare his defense before trial, he may

resort to a bill of particulars. An indictment is certainly not deficient merely because it fails to disclose all of the information that may be required to be disclosed on a motion for a bill of particulars.

Since the decision below was rendered three district judges in the District of Columbia have held that indictments similar to the ones here involved were sufficient, specifically expressing their disagreement with the decision below. See decisions of the District Court for the District of Columbia in *United States* v. *E. Merl Young,* 113 F. Supp 20, by Judge McGuire on April 29, 1953; in *United States* v. *Lattimore,* 112 F. Supp. 507, by Judge Youngdahl on May 2, 1953; and in *United States* v. *Herschel Young,* No. 1725-51 by Judge Holtzoff on May 12, 1953. These cases involved identical allegations insofar as they are pertinent here. The two earlier decisions rejected the majority holding here as not being "persuasive" and accepted dissenting Judge Rives' holding as applicable to their cases. Judge McGuire stated that the dissent "stated the law as it is today, at least in the Federal courts, and he has both reason and basic common sense on his side." Judge Holtzoff, who was instrumental in preparing the rules of criminal procedure, in his opinion in *Herschel Young, supra,* said, that if it had not been for the decision in *Debrow,* he "would have been inclined to regard this objection as a sheer technicality bordering on the frivolous and the absurd, and to overrule it without discussion, perhaps citing Mr. Bumble as the sole authority." The validity of other such indictments were upheld

against similar attacks in the District Court for the District of Columbia by a fourth judge, Judge Schweinhaut, in *United States* v. *Rosenbaum*, No. 1722-51, on December 23, 1952, and in *United States* v. *Robert W. Dudley*, No. 1724-51, on May 15, 1953.

In comparable situations, the courts have held that the name of a particular person is not an essential fact which must be alleged in an indictment. Thus, in *Roberts* v. *United States*, 137 F. 2d 412, 414 (C.A. 4), certiorari denied, 320 U. S. 768, the court held that an indictment under the false claims statute (18 U.S.C. (1946 ed.) 80) which alleged that the claim had been presented to the Navy Department was sufficient without an allegation specifying the name of the officer to whom the claim was presented and his authority to pay the claim. In *United States* v. *Polakoff*, 112 F. 2d 888, 890 (C.A. 2), an allegation that the accused conspired "to influence and impede the official actions of officers in and of the United States District Court" was held sufficient although the indictment did not allege who the officers were that were to be so impeded. The court said, "we do not see why, if the accused were really in ignorance of this detail, they could not have been fully protected by a bill of particulars."

Specifically in relation to perjury, the Court of Appeals for the Ninth Circuit held in *United States* v. *Bickford*, 168 F. 2d 26, that an indictment which alleged that a witness before a District Court had taken an oath before the clerk of that court was sufficient even though there was no allegation

that the clerk had authority to administer an oath. The court held that, since the authority of the clerk was implicit in the facts alleged, the indictment was sufficient under Rule 7(c).

Thus, by the standards of modern pleading as set forth in Rule 7(c) the indictments herein, which alleged all the elements of the offense as defined by the statute defining the offense, were sufficient.

B. *The court below misinterpreted the history and effect of R.S. 5396*

In support of its position, the majority below relied principally upon the provisions of Section 5396 of the Revised Statutes, *supra*, p. 3, and on its earlier decision in *Hilliard* v. *United States*, 24 F. 2d 99, which was decided under Section 5396, even though it recognized that this section had been expressly repealed in the 1948 revision of Title 18, Act of June 25, 1948, 62 Stat. 683, 862.

Section 5396 provided that:

> it shall be sufficient [in a perjury indictment] to set forth * * * by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same * * *.

The court below sought to avoid the impact of the statute's repeal by saying that its repeal did not destroy the requirement that a perjury indictment should state "by whom it is charged that he was sworn, either by disclosing the name of the person administering the oath, or his official capacity, and that he was in fact possessed of the requisite au-

thority" (R. 21). The court seems to be saying that the above-quoted provisions of Section 5396 merely gave recognition to preexisting essential elements of perjury not set forth in the perjury statute (18 U.S.C. 1621, *supra*, pp. 2-3), and that these essential elements survived the repeal of Section 5396. This analysis by the court below ignores the history of Section 5396.

Section 5396 was never intended to add to the definition of the crime of perjury. It was not a substantive law statute as the analysis of the court below suggests, but rather a procedural statute. It originated with the Crimes Act of April 30, 1790 (1 Stat. 112, 116, c. 9) and appeared in Section 19 of that Act. Section 19 in turn was copied verbatim in pertinent respects from English law, Act of 23 George II, Chap. 11 (20 Eng. Stat. 11) enacted in 1750. *Markham* v. *United States*, 160 U.S. 319, 323, 324; *United States* v. *Cuddy*, 39 Fed. 696, 697 (S.D. Cal.); 2 Wharton's *Criminal Law* (12th ed.) Section 1554. The English statute was passed "to render prosecutions for perjury, and subornation of perjury, more easy and effectual" [6]

[6] The statute provides: "Whereas by reason of difficulties attending prosecutions for perjury, and subornation of perjury, those heinous crimes have frequently gone unpunished, whereby wicked and evil-disposed persons are daily more and more emboldened to commit the same, to the great dishonour of God, and manifest let and hindrance of justice; for remedy whereof be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court,

by minimizing the matters to be pleaded in a perjury indictment. Prior thereto, perjury indictments had been needlessly prolix, and contained a detailed account of the proceedings in which perjury was alleged to have been committed including the pleadings and the evidence taken. Consequently it was difficult to draft a perjury indictment which contained all of these matters in proper form. Frequently prosecutions were unsuccessful not because of lack of guilt but because of variance as to unimportant details between the proof on trial and the allegations in the indictment. See 2 Chitty's *Criminal Law* (1847), p. 306.[1] Thus, the English Act and Section 5396 were not intended to affect or grant any substantive rights which because of their fundamental nature became ingrained into our federal laws. They were procedural statutes, the aim of which was to cut down on the matters to be pleaded. ***The King*** v. ***Dowlin,***

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or before whom the oath was taken (averring such court or person or persons, to have a competent authority to administer the same) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding either in law or equity, other than as aforesaid; and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed; any law, usage, or custom to the contrary notwithstanding." (Italics added.)

[1] This result may have been desirable in the era when practically every felony was punishable by death and the courts took advantage of every technicality to avoid the death penalty. As the penalties became less stringent, these technicalities became outmoded and socially undesirable. See *United States* v. *Starks*, 6 F.R.D. 43 (S.D. N.Y.); Holtzoff, *Reform of Federal Criminal Procedure*, 3 F.R.D. 445, 447.

proved the thesis that an indictment must set forth the identity of the person administering the oath and his authority. The authority to administer the oath may be charged either in words or by naming the office held so that the court may reach its own judgment as to authority.

That indictment charged Markham with having taken "a solemn oath before G. C. Lumas, then and there a special examiner of the Pension Bureau of the United States, and then and there a competent officer and having lawful authority to administer said oath" and this Court held it to be adequate.

In *United States v. Hall*, 131 U. S. 50, 33 L. Ed., 97, the Court discussed at length the statutory character of oaths and persons who could administer them. It adverted to the fact that "The statutes are full of such partial and special enactments about Notaries Public, Commissioners of the Circuit Courts, Clerks of the Courts, and various others by whom oaths may be administered", and reached the conclusion quoted by the court below that "It can hardly be supposed that a defendant indicted for perjury can be held to be guilty, unless the oath in regard to which the perjury is charged was taken before an officer of some kind having due authority to administer the oath."

The Court of the Fifth Circuit held that it was necessary to show before whom the oath was taken, and that the officer had authority to administer it in *Hillard v. United States*, 24 F (2) 99. The Court of Appeals of the Eighth Circuit, in *Danaher v. United States*, 39 F (2) 325,

5 T.R. 311, 317; *The King* v. *Perrott*, 2 M & S 379, 385.

While Section 5396 in the Revised Statutes provided that "it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, *and* before whom the oath was taken, * * *" (italics added), when Section 5396 was enacted for the first time in the Crimes Act of April 30, 1790, the word "or" appeared instead of the word "and" italicized above.[8] The English statute from which Section 5396 was copied likewise used the word "or" in that place instead of "and." We have been unable to find any explanation of the substitution of the word "and" in Section 5396 for the word "or." Our assumption is that at the time of the revision and codification in the revised statutes, the revisers or printers inadvertently used the word "and" in that connection. There is no indication that any change in the law was intended when the revised statutes were enacted. The word "and" in Section 5396

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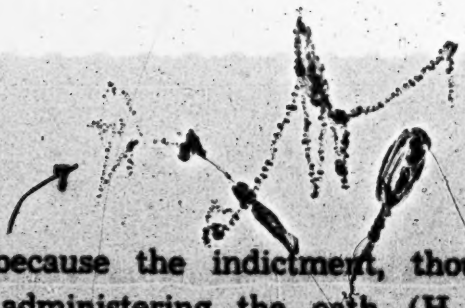
[8] 1 Stat. 116 provided:

"Sec. 19. *And be it [further] enacted*, That in every presentment or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath or affirmation was taken, (averring such court, or person or persons to have a competent authority to administer the same) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed."



reversed a conviction because the indictment, though naming the individual administering the oath (H. D. Irwin), did not sufficiently describe his status as United States Commissioner.

The Court of Appeals of the Tenth Circuit, in *Travis v. United States*, 123 F (2) 268, approved an indictment only because it set forth, not only the court in which the oath was taken, giving the number and style of the case, but also "set forth the name and official capacity of the person who administered the oath, charged that he was authorized by law to administer it . . ."

The Court of the Ninth Circuit, in *United States v. Bickford*, 168 F (2) 26, sustained a perjury indictment charging false swearing in a District Court only when the indictment charged that the false swearing took place after the defendant had "taken an oath as a witness before the said District Court which was administered by the Clerk of said Court. . ."

And the Court of the Third Circuit has held to be material "The averment that an oath has been administered and the averment of the one administering it." See *Levy v. United States*, 271 Fed. 942 and cf. *United States v. Doshen*, 133 F (2) 757.

Those cases recognize that tribunals cannot administer oaths and that a person must be given the oath by a human being holding an office empowering him to give the oath by specific provisions of a federal statute. No reported case from an appellate court has ever held the contrary.

has been interpreted to mean "or." *West* v. *United States*, 258 Fed. 413, 415 (C.A. 6); *United States* v. *Walsh*, 22 Fed. 644 (C.C. D. Mass.). The word "or" between the phrases "by what court" and "before whom the oath was taken" clearly indicated that an alternative was intended, and that where perjury was alleged before a court or a tribunal, as here, the name of the person administering the oath was not needed. See *West* v. *United States, supra*, at 414-415; *United States* v. *Howard*, 132 Fed. 325, 341-342 (W.D. Tenn.); *United States* v. *Walsh, supra*, which dealt with this question specifically; see also *Smith* v. *People*, 32 Colo. 251; *The State* v. *O'Hagan*, 38 Iowa 504; *Campbell* v. *The People*, 8 Wend. 636 (Ct. Cr. N.Y.); *State of Oregon* v. *Spencer*, 6 Or. 152, where indictments were upheld against the same attack involved here in that, like the instant cases, they alleged the name and authority of the body (court or tribunal) before whom the oath was taken, without designating the name of the person who administered it. Thus the original statute on which Section 5396 was based presented the same alternative as the present statute defining perjury, i.e. a competent tribunal *or* a person having competent authority to administer the oath. The interpretation of the instant indictments as sufficient is accordingly buttressed rather than negatived by the history of Section 5396.

Certainly, whatever was the proper construction of the "and" in R.S. 5396, that use of "and" is not now controlling. In repealing Section 5396, Con-

gress intended that it be superseded by Rule 7(c). S. Rep. No. 1620 (80th Cong., 2d Sess.), pp. 1-2 which in turn refers to H. Rep. No. 304 (80th Cong., 1st Sess.) pp. 8, 9; Barron, *Federal Practice and Procedure*, Section 1914. Therefore the sole governing statute here is 18 U.S.C. 1621 which does use the word "or" in defining the offense. As we have already shown, *supra*, pp. 8-17, the indictments here allege all the elements of perjury as found in that statute.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below should be reversed.

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SEPTEMBER, 1953.

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eme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

Nos. ~~765-769~~ 51-55

UNITED STATES OF AMERICA,
Petitioner,
51
versus
HENRY DEBROW,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
versus
52
JAMES H. WILKINSON,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
versus
53
ROY F. BRASHIER,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
versus
54
CURTIS ROGERS,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
versus
55
FORREST B. JACKSON,
Respondent.

NTS' BRIEF IN OPPOSITION TO PETITION FOR OF CERTIORARI TO THE UNITED STATES COURT PEALS FOR THE FIFTH CIRCUIT.

W. S. HENLEY,
R. W. THOMPSON, JR.,
ALBERT SIDNEY JOHNSTON, JR.,
BEN F. CAMERON,
— Counsel for Respondents.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

Nos. 765-769.

UNITED STATES OF AMERICA,
Petitioner,

versus

HENRY DEBROW,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

versus

JAMES H. WILKINSON,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

versus

ROY F. BRASHIER,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

versus

CURTIS ROGERS,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

versus

FORREST B. JACKSON,
Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Question Presented is more accurately stated as follows:

Whether a perjury indictment is subject to dismissal because of its failure to allege the identity of the person

who administered the oath either by *naming him or giving the office held or the authority possessed by him* when the "tribunal" is *not a court of justice* but a senate sub-committee.

I.

The Petition does not disclose any "special and important reasons" for its allowance under Rule 38.

1. No prejudice results to the government from the decision of the Court of Appeals for the Fifth Circuit, either with respect to these prosecutions or the others listed at pages 6-7 of the Petition. No statute of limitations has run or threatened to run, and the cases can be presented to the Grand Jury again.

2. The decision of the court below can be satisfied by the addition of a simple phrase so as to conform these indictments to that which the government used in the case of *United States v. Meyers*, 75 F. Supp. 486, aff. 171 F(2) 800, cert. den. 336 U. S. 912, 93 L. Ed., 1076. The reported decision of that case (75 F. Supp. 487) states: "The indictment alleges that the oath in this instance was administered by Honorable Homer Ferguson, a member of the United States Senate, as Chairman of a Sub-committee." The government used that form of indictment long after the effective date of the rules of Criminal Procedure.

3. The decision of the court below does not conflict with that of any other circuit. The *Bickford* case (168 F (2) 26) involved an indictment which charged that the

defendant had "taken an oath as a witness before the said District Court which was *administered by the Clerk of the said court . . .*" (Emphasis supplied here and elsewhere unless otherwise stated).

In *United States v. Polakoff,* 122 F. 888, the name of the officer charged to be influenced was not of the essence of the crime. It was a violation of the law to impede and influence any officer. The identity of the officer in the case before the Court is essential so that the Court might see for itself whether the officer had authority under federal statutes to administer an oath.

4. The question raised by the Petition does not embrace a novel matter of peculiar public interest relating to the construction of Rule 7 (c). The question involves primarily the determination of what are the essential elements of the crime of perjury, as a matter of substantive law. Everybody agrees that Rule 7 (c) requires that the indictment set forth every essential *fact* going to make up the charge of perjury.

II.

The essential ingredients of perjury include an oath administered by a person having authority to administer it, and a willful statement concerning a material fact contrary to such oath, 18 U. S. C. 1621. That these are minimum ingredients of the crime of perjury has been accepted since the foundation of the Republic, and has never been questioned in an appellate court prior to these proceedings. No reported case from an appellate court has upheld an indictment which failed to charge those

essential facts. The history of the development of our jurisprudence shows that the necessity for so charging is deeply embedded in the law.

1. **At Common Law.** This Court held in *United States v. Curtis*, 107 U. S. 671, 27 L. Ed., 534, that perjury cannot be charged at common law or under federal statutes based on "an oath before one who has no legal authority to administer oaths of a public nature, or before one who, although authorized to administer some kind of oaths, but not the one which is brought in question."

In addition to those ingredients listed as essential, *supra*, the common law required the prosecutor "to set out in the indictment the title of the cause in which the witness was sworn and testified, the record and all of the pleadings therein, thus disclosing jurisdiction and the issue, as a guide to the determination of the question whether the testimony of the witness charged to be false were material. The commission of the officer before whom the oath was taken was also set out". *Danaher v. United States* (Eighth Circuit) 39 F (2) 325, 326. To eliminate the exhibiting of so voluminous a record, Congress dealt with the subject by statute.

2. **Common Law as Abridged by Statute.** By the Crimes Act of April 30, 1790, Congress mitigated the rigors of the common law rule by adopting the English statute, 23 Geo. II, Chap. 11; *Markham v. United States*, 160 U. S. 319, 324, 40 L. Ed. 441, 443. This statute was carried as Rev. Stat. 5396, 18 U. S. C. 558, and remained, as originally passed, a part of the Criminal Code until the recodification of 1948.

That statute accepted and recognized the requirements of the common law that the indictment should set forth, ". . . by what court and *before whom the oath was taken, averring such court or person to have competent authority to administer the same*. . .."; and effected reforms with respect to two features of the common law requirements. The first of these made it possible for the government to set forth "the substance of the offense charged upon the defendant". The *Markham* case quotes Chitty's Criminal Law and other authorities (160 U. S. 324-5) holding that the gist of this feature of this reform was that it made it possible to charge that the false swearing was about a material matter without setting forth the details of its materiality.

The other reform embraced in the remedial statute relieved the government from bringing forward with its indictment the entire record of the proceeding in which the defendant had testified, this being the excluding language: ". . . without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed". Only in these two particulars did the statute essay to abridge common law requirements with respect to perjury indictments.

3. **Decisions of the Courts.** Beginning with this Court's decision in 1895 in the *Markham* case, every appellate court which has spoken on the subject has ap-

4. The Ingredients of Perjury Have Never Varied. No statute dealing with the facts constituting perjury has been repealed. The statute defining perjury, 18 U. S. C. 1621, is in the same language today as when the *Markham* case and all of the others were decided. Perjury consists of the same structure of facts today as then. The sole duty performed by the District Court and the Court of Appeals in the present cases was to lay the facts of these indictments alongside these established principles of law to discover whether those facts charged the substantive crime of perjury.

If these essential facts were not charged, the indictment was condemned by Rule 7 (c), whatever construction might be placed upon the meaning and function of that rule.

III.

Effect of Repeal of R. S. 5396, 28 U. S. C. A. 558.

1. The repeal of a statute whose only mission was to minimize the requirements of an indictment does not carry the presumption that those minima were further diminished. It is more logical to conclude that Congress intended to abolish those minimum requirements and relegate draftsmen of indictments to the sterner requirements of the law as it existed without the statute.

The prime efficacy of 28 U. S. 558 lay in the things it permitted the government to leave out of an indictment. It granted leave that an indictment might contain the substance of the materiality of the false swearing,

omitting the details, and might omit entirely the pleadings and record of proceedings and the commission of the person before whom the oath was taken.

It is rather to be assumed, therefore, that Congress felt free to leave that statute out of the revised code because it was assured that the courts would, under Rule 7 (c), grant to the government the right to omit from the indictment those things which the language of the statute had stamped as non-essential.

There is no ground at all for the assumption that Congress intended that the courts applying Rule 7 (c) should exempt the government from the necessity of charging all of the essential facts of perjury which had been accepted as standard throughout the life of the nation, and which Section 558 recognized as established substantive law.

2. The most significant thing that can be said of Section 558 is that its acceptance of the requirement that a perjury indictment must set forth "by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same," and its reenactment unchanged for more than a century and a half, helped to crystalize the quoted requirement into a principle of law of universal acceptance.

3. There is no merit, therefore, to the government's contention that the omission of Section 558 from the recodification of 1948, and the supposed substitution of Rule 7 (c) for it carries the presumption that Congress intended to reject entirely the legal principle so long

recognized by the statute. Quite the contrary is true under the holding of this Court in *Morisette v. United States*, 342 U. S. 246, 96 L. Ed., 288.

Under consideration there was the effect of the omission of intent from the recodification of the law against embezzlement, larceny, and similar crimes Congress had effected in the new statute, 18 U. S. C. 641. Morisette had contended that "both the indictment and the statute require proof of felonious intent". The Court of Appeals of the Sixth Circuit rejected that contention, 187 F (2) 427, 429, holding that it was the manifest purpose of Congress to drop intent as an ingredient of the offense. That Court held the indictment good under Rule 7 (c), feeling that "the federal courts long ago abandoned the course of reversing conviction for crime on the technical niceties of pleadings".

This Court reversed, using language of similar import to that employed by the District Court in its opinion in this case (R. 13):

> "As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle, but merely recognized that intent was so inherent in the idea of the offense that *it required no statutory affirmation*. . . .
>
> "And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken, and the meaning its use will convey to

the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as *satisfaction with widely accepted definitions, not as a departure from them. . .*"

IV.

1. **Indictment May Not Proceed by Presumption or Implication.** Facts cannot be supplied by the use of a legal conclusion expressed by an adverb such as "duly". It is significant that both the dissenting opinion and the Petition lay great stress on the use of this word. The very fact that they feel called upon to fall back on the use of this word concedes that essential facts are missing which they conceive this adverb supplies.

The use of "duly" connotes that the draftsmen of the indictment looked at certain facts, and considered that they spelled out such propriety of action that he could characterize them by the use of that word. The law requires that the *facts* appear in the indictment so that the defendant may know them and that the court may judge them. It is universally accepted that legal conclusions cannot take the place of facts, and nobody suggests that Rule 7 (c) changes this principle. *United States v. Hess*, 124 U. S. 483, 31 L. Ed. 516; *Alabama Packing Company v. United States*, (Fifth Circuit) 167 F (2) 179; *Johnson v. United States*, (Ninth Circuit) 294 F. 753; *United States v. Martin*, (Third Circuit), 36 F (2) 944, cert. den. 281 U. S. 736, 74 L. Ed., 1151; *Cooper v. United States*, (Second Circuit) 299 F. 483; *United States v. Cruickshank*, 92 U. S. 542.

2. The Petition does not disguise its reliance upon implication to supply the important *fact* of the identity of the officer administering the oath. At page 9, it argues that the indictment charged a "*competent*" tribunal and an oath "*duly* administered", "necessarily *implying* administration of the oath by an authorized person." The adjective, competent, and the adverb, duly, are expressions of opinion, not statements of *facts*.

It is important that the person giving the oath be identified. The oath is the foundation of the prosecution. Federal oaths are statutory only, and the authority to administer the particular oath must affirmatively appear from the indictment. *United States v. Curtis, supra.* The authority to give the oath may not be implied. "Legislation may proceed by impliication but good pleading may not". *Robertson v. U. S.* (Fifth Circuit) 168 F (2) 294 and cf. *U. S. v. Carll*, 105 U. S. 611, 26 L. Ed., 1135, and *United States v. Hess, supra.* No presumption of regularity could attend the giving of an oath under a statutory body of limited and transient jurisdiction such as a congressional committee.

3. Particularly is the identity of the person giving the oath here important since the chief justification offered by the government for dispensing with this is the use of the word "tribunal". Both Webster's Unabridged Dictionary and Black's Law Dictionary define a tribunal as a *Court of Justice.* The words of Judge Holtzoff in the recent case of *United States v. Meyers, supra,* are applicable (75 F (2) 487):

> "The Court has considerable doubt whether a congressional committee is a tribunal, because the word

'tribunal' implies an officer or body having authority to adjudicate matters. But . . . it is not necessary to determine whether a congressional committee is a tribunal, because the statute . . . includes an oath taken before an officer or any other person authorized to administer oaths. The indictment alleges that the oath in this instance was administered by Honorable Homer Ferguson, a member of the United States Senate, as Chairman of a Sub-committee."

4. The government seeks to sustain these indictments mainly on the argument that the court should presume that the oath was administered by a proper officer because it was before a tribunal thought to be competent. Moreover, the government leans heavily on the dissenting opinion (R. 25) which not only gives much weight to the legal conclusion expressed by "duly", but implies knowledge on the part of the defendants, e. g., "In all probability, the defendants knew which Senator acted."

If the presumption of innocence and lack of knowledge on the part of the defendants is to be laid aside, one could, with equal logic, speculate that the defendants probably knew the identity of the tribunal and also what they had sworn. The use of such an expedient would make it difficult to establish that any particular fact is an essential fact.

V.

Effect of Rule 7 (c) Misconstrued.

Rule 7 (c) is not entitled to be construed as having an effect as cataclysmic as that with which the government

seeks to invest it. It did not spring "full-fledged" from the mind of Congress as Pallas is reputed to have sprung from the head of Jove. It is rather the synthesis of its prototype, 18 U. S. C. 556, plus the evolution wrought by the courts under it. This Court had long since sanctioned a departure from "the rigor of old common law rules of criminal pleading" in a line of cases of which *Hagner v. United States,* 285 U. S. 427, 76 L. Ed., 861 is an example. The Court of the Fifth Circuit had been in the forefront of those which were studious to deny to defendants "A vested right in the veteran absurdities of criminal procedure", *Whitehead v. United States,* (1917) 245 F. 385. And see *Wilson v. United States,* 158 F (2) 659; cert. den. 330 U. S. 850; *Robertson v. United States, supra,* and *Parsons v. United States,* 189 F (2) 252.

Every article or statement of a text writer on the subject winds up with some such statement as: "Every ingredient or essential element of the offense should be alleged". 4 Baron and Holtzoff Federal Practice and Procedure, 63-4.

CONCLUSION.

The indictment represents the solemn findings of a grand jury based presumably on facts established by evidence. Respondents are entitled to have the grand jury consider evidence and adjudge whether they were sworn by an officer with authority. They ought not to be compelled to face a trial jury on the mere conclusions of the draftsmen of the indictment. Their rights under

the Sixth Amendment can be protected without prejudicing the position of the government in these or any other prosecutions.

The Petition should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 51
UNITED STATES OF AMERICA, *Petitioner,*
vs.
HENRY DEBROW

No. 52
UNITED STATES OF AMERICA, *Petitioner,*
vs.
JAMES H. WILKINSON

No. 53
UNITED STATES OF AMERICA, *Petitioner,*
vs.
ROY F. BRASHIER

No. 54
UNITED STATES OF AMERICA, *Petitioner,*
vs.
CURTIS ROGERS

No. 55
UNITED STATES OF AMERICA, *Petitioner,*
vs.
FORREST B. JACKSON

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF

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SUPREME COURT OF THE UNITED STATES

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No. 51

UNITED STATES OF AMERICA, *Petitioner,*

vs.

HENRY DEBROW

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FORREST B. JACKSON

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Question Presented

The government leaves out important elements in its statement of the issues. The question presented is more accurately stated as follows:

> "Whether a perjury indictment is subject to dismissal because of its failure to allege the identity of the person who administered the oath either by *naming him or giving the office held or the authority possessed by*

him, when the "tribunal" *is not a court of justice* but a Senate sub-committee; and when the indictment does not charge that the "tribunal" had authority to administer the oath.

Statement

The indictment (R. 5, Br. 4) [1] charges merely:

> "The defendant herein, having duly taken an oath before a competent tribunal, to-wit: A sub-committee of the Senate Committee on Expenditures . . . , a duly created and authorized sub-committee of the United States Senate . . . inquiring in a *matter* then and there pending before the said sub-committee in which a law of the United States *authorizes that an oath be administered* . . .

The only authority referred to as far as an oath is concerned relates solely to the "matter" then pending. The indictment states that it was the kind of matter in which the law authorizes an oath to "be administered".

The indictment does not essay to mention by what authority the *tribunal* could administer the oath nor the identity of the person charged with administering the oath, either by giving his name or the office held by him and does not charge that the person had authority to administer the oath.

The heart of the opinion of the District Court is contained in this language (R. 13):

> "Almost from the beginning of the republic, such a statute has been a part of our law and my thought is that in its enactment, Congress was saying that no matter how many technical matters may be left out of an indictment for perjury, you must give the defendant the name and the authority of the person who ad-

[1] Record references are, unless otherwise indicated, to the record in No. 51, *United States* v. *Debrow*, and the brief of the United States will be referred to by the abbreviation BR., unless stated. All emphasis, in quoted statements, is supplied by us, unless otherwise shown.

ministered the oath. I think this was merely the recognition by the legislative branch of the government of the justice of this and the necessity for it, if defendants were to have a fair chance to know what they were charged with . . ."

"I think what they [Congress] meant to say was that the principle is so thoroughly embedded in our law that it is not necessary any longer to have it in the statutes . . ."

And the pith of the decision of the Court of Appeals for the Fifth Circuit [2] is contained in these words:

"But despite its minimum requirements, this statute plainly required that the indictment should 'set forth the substance of the offense charged upon the defendant . . . and by what court and before whom the oath was taken, averring such court or person to have competent authority to administer the same . . . ' It may not, therefore, be rightly said that its repeal destroyed the requirements which formed the basis of the Hilliard decision. But regardless of this statute and its repeal it still remains a fundamental requirement that every essential element of the crime sought to be charged must be stated in the indictment and so stated that the defendant from the allegation of the indictment may understand what he is called upon to defend. This the Sixth Amendment of the Federal Constitution requires . . .

"But where the statute itself omits an essential element of the offense or includes it only by implication the indictment must descend to particulars and charge every constituent ingredient of which the crime is composed . . .

"The indictments under review do not allege an offense in the words of the statute . . . Rule 7(c) requires that an indictment shall contain a *definite* written statement of the *essential facts*, constituting the offense charged and the paramount provisions of the

[2] Record 29-30, 203 F(2) 699, 701-2.

Sixth Amendment are 'that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation.' We think that it is essential to inform the accused by whom it is charged that he was sworn, either by disclosing the name of the person administering the oath, or his official capacity, and that he was in fact possessed of the requisite authority. These are matters of substance which affect the substantial rights of the accused. It is apparent to us as it was to the Supreme Court that there can be no conviction of perjury 'unless the oath in regard to which the perjury was charged was taken before an officer of some kind having authority to administer the oath.' "[3]

The brief filed on behalf of the United States does not meet the impact or deal with the questions discussed in this language from the opinions below. Nor does the government's brief make the concessions contained in the dissenting opinion of Judge Rives. While relying heavily upon that opinion, as will be demonstrated, *infra*, the government seeks to apply a rigid rule that an indictment in the language of the statute is always sufficient; while the dissent[4] concedes, under authorities cited, that this rule does not control "where the words of the statute do not contain all of the essential elements of the offense". The government contends categorically that the omitted facts may be supplied by a bill of particulars, while the dissent[5] concedes, under authorities cited, that "a bill of particulars can not be used to cure an indictment fatally defective . . . , but it may be employed to discover all pertinent details, everything but the 'essential facts'."

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[3] Emphasis not supplied. The reference is to *United States* v. *Hall*, 131 U. S. 50, 9 Supreme Court 663, 33 L. Ed., 97.

[4] R. 23, 203 F(2) 703.

[5] *Ib.*

Nor does the government deal with the serious question of whether anything but courts of justice are embraced within the term "tribunal" as used in 18 U. S. C. 1621 or with the manifest difference between oaths administered by courts of justice and those administered, under the authority of more than seventy statutes, by the multitude of commissions, boards and individuals.

Nor does the government point out any statutory authority at all for the administering of an oath by a Senate sub-committee as an entity nor advert to the fact that the indictment does not state that the Senate Committee had authority to administer the oath.

The dissenting opinion of Judge Rives recognizes that the sole authority for administering oaths before a Senate Committee is conferred by 2 U. S. C. A. 191 (R. 25) and that such authority is conferred on the individual senators by U. S. C. 191. The dissenting judge felt that the word "duly" supplied the inference that some individual senator administered the oath. The government does not discuss that important question at all, contenting itself with an effort to sustain the indictment as having been taken *before* a "tribunal"; while the dissenting judge obviously sought to sustain the indictment under the alternative provision of the statute, "officer or person."

A full development of the questions involved in a decision of the case before the Court requires, therefore, that Respondents deal not only with the questions mentioned in the government's brief, but also with those the brief has omitted to mention.

ARGUMENT

I

The Indictment Does Not State the Essential Elements of the Offense

A. *The Essential Ingredients of Perjury*

The essential ingredients of perjury include an oath administered by a person having authority to administer it, and a willful statement concerning a material fact contrary to such oath, 18 U. S. C. 1621. That these are minimum ingredients of the crime of perjury has been accepted since the foundation of the Republic, and has never been questioned in an appellate court prior to these proceedings. No reported case from an appellate court has upheld an indictment which failed to charge those essential facts. The history of the development of our jurisprudence shows that the necessity for so charging is deeply embedded in the law.

1. *At Common Law*

This Court held in *United States* v. *Curtis*, 107 U. S. 671, 27 L. Ed., 534, that perjury can not be charged at common law or under federal statutes based on "an oath before one who has no legal authority to administer oaths of a public nature, or before one who, although authorized to administer some kinds of oaths, but not the one which is brought in question."

In addition to those ingredients listed as essential, *supra*, the common law required the prosecutor "to set out in the indictment the title of the cause in which the witness was sworn and testified, the record and all of the pleadings therein, thus disclosing jurisdiction and the issue, as a guide to the determination of the question whether the testimony of the witness charged to be false were material. The com-

mission of the officer before whom the oath was taken was also set out". *Danaher* v. *United States* (Eighth Circuit) 39 F.(2) 325, 326. To eliminate the exhibiting of so voluminous a record, Congress dealt with the subject by statute.

2. *Common Law as Abridged by Statute*

By the Crimes Act of April 30, 1790, Congress mitigated the rigors of the common law rule by adopting the English statute, 23 Geo. II, Chapter 11; *Markham* v. *United States*, 160 U. S. 319, 324, 40 L. Ed., 441, 443. This statute was carried as Rev. Stat. 5396, 18 U. S. C. 558, and remained, as originally passed, a part of the Criminal Code until the recodification of 1948.

That statute accepted and recognized the requirements of the common law that the indictment should set forth, ". . . by what court and *before whom the oath was taken, averring such court or person to have competent authority to administer the same* . . .": and effected reforms with respect to two features of the common law requirements. The first of these made it possible for the government to set forth "the substance of the offense charged upon the defendant". The *Markham* case quotes Chitty's Criminal Law and other authorities (160 U. S. 324-5) holding that the gist of this feature of this reform was that it made it possible to charge that the false swearing was about a material matter without setting forth the detailed records from which its materiality might be gleaned.

The other reform embraced in the remedial statute relieved the government from bringing forward with its indictment the entire record of the proceeding in which the defendant had testified, this being the excluding language: ". . . without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, or any affidavit, deposi-

tion, or certificate, other than as hereinabove stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed". Chiefly in these two particulars did the statute essay to abridge common law requirements with respect to perjury indictments.

3. *Decisions of the Courts*

Beginning with this Court's decision in 1895 in the *Markham* case, every appellate court which has spoken on the subject has approved the thesis that an indictment must set forth the identity of the person administering the oath and his authority. The authority to administer the oath may be charged either in words or by naming the office held so that the court may reach its own judgment as to authority.

The indictment charged Markham with having taken "a solemn oath before G. C. Lumas, then and there a special examiner of the Pension Bureau of the United States, and then and there a competent officer and having lawful authority to administer said oath" and this Court held it to be adequate.

In *United States* v. *Hall*, 131 U. S. 50, 33 L. Ed., 97, the Court discussed at length the statutory character of oaths and persons who could administer them. It adverted to the fact that "The statutes are full of such partial and special enactments about Notaries Public, Commissioners of the Circuit Courts, Clerks of the Courts, and various others by whom oaths may be administered", and reached the conclusion quoted by the court below that, "It can hardly be supposed that a defendant indicted for perjury can be held to be guilty, unless the oath in regard to which the perjury is charged was taken before an officer of some kind having due authority to administer the oath."

The Court of the Fifth Circuit held that it was necessary to show before whom the oath was taken, and that the officer had authority to administer it in *Hilliard* v. *United States*, 24 F(2) 99. The Court of Appeals of the Eighth Circuit, in *Danaher* v. *United States*, 39 F(2) 325, reversed a conviction because the indictment, though naming the individual administering the oath (H. D. Irwin), did not sufficiently describe his status as United States Commissioner.

The Court of Appeals of the Tenth Circuit, in *Travis* v. *United States*, 123 F(2) 268, approved an indictment only because it set forth, not only the court in which the oath was taken, giving the number and style of the case, but also "set forth the name and official capacity of the person who administered the oath, charged that he was authorized by law to administer it . . ."

The Court of the Ninth Circuit, in *United States* v. *Bickford*, 168 F(2) 26, sustained a perjury indictment charging false swearing in a District Court only when the indictment charged that the false swearing took place after the defendant had "taken an oath as a witness before the said District Court which was administered by the Clerk of said Court . . ."

And the Court of the Third Circuit has held to be material "The averment that an oath has been administered and the averment of the one administering it." See *Levy* v. *United States*, 271 Fed. 942 and cf. *United States* v. *Doshen*, 133 F(2) 757.

Not a single reported case from an appellate court, whether federal or state,[6] has ever held the contrary.

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[6] The state decisions are entirely in accord with the federal cases. See, e.g., *Paxton* v. *Walters*, 72 Ariz. 120, 231 P. 2d 458 (1951); *State* v. *Broshears*, 18 Ariz. 356, 161 P. 873 (1916); *Adkinson* v. *State*, 59 Fla. 1, 51 So. 818 (1910); *Campbell* v. *State*, 92 Fla. 775, 109 So. 809 (1926); *Craft* v. *State*, 42 Fla. 567, 29 So. 418 (1900); *State ex rel. Reed* v. *Blitch*, 97 Fla. 260, 120 So. 355 (1929); *Walker* v. *State*, 119 Fla. 240, 161 So.

The treatise writers are equally in accord with this consistent body of authority.[6a]

The significant point of this array of authority is that the Government is not able to point to a single case in a federal or state appellate court where the issue has been raised and where the court has held it is not necessary for the indictment to show on its face the identity in any form of the party administering the oath.

We have found cases sustaining indictments which did not name the person administering the oath but at least described him by the office held by him, such as the clerk of the court, election inspector, foreman of a grand jury, etc., thus permitting the defendant and the court to inspect the statutes and ascertain that an officer so described has or lacks authority to administer the oath.[7]

And this, of course, is all that the *Bickford* case means.

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278 (1935); *Wilds* v. *State*, 79 Fla. 575, 84 So. 664 (1920); *Wilson* v. *State*, 115 Ga. 206, 41 S.E. 696, 90 Am. St. Rep. 104 (1902); *State* v. *Gross*, 175 Ind. 597, 95 N.E. 117 (1911); *State* v. *Biedermann*, 342 Mo. 957, 119 S.W. 2d 270 (1938); *State* v. *Thothos*, 147 Mo. App. 596, 126 S.W. 797 (1910); *State* v. *Pray*, 64 Nev. 179, 179 P. 2d 449 (1947); *State* v. *Woolridge*, 45 Ore. 389, 78 P. 333 (1904); *Green* v. *State*, 86 Tex. Cr. R. 556, 217 S.W. 1043 (1920); *State* v. *McCone*, 59 Vt. 117, 7 A. 406 (1887); *State* v. *Epstein*, 138 Wash. 18, 244 P. 388 (1926).

[6a] 70 C.J.S. 506-508; 124 Am. St. 663; 41 Amer. Jur. 23; Bishop, New Criminal Procedure, Vol. III, Sec. 914; Wharton, Criminal Pleading and Practice, 9th Ed., Sec. 151, pp. 102-103 (1899).

[7] See, e.g., Clerk of the court: *U.S.* v. *Bickford*, 168 F. 2d 26 (C.C.A. 9, 1948); *State* v. *Harter*, 131 Iowa 199, 108 N.W. 232 (1906); Deputy clerk of court: *Masterson* v. *State*, 144 Ind. 240, 43 N.E. 138 (1896); *State* v. *Townley*, 67 Ohio St. 21, 93 Am. St. Rep. 636, 65 N.E. 149 (1902); Trial court: *Beavers* v. *State*, 124 Ark. 38, 186 S.W. 300 (1916); Foreman of grand jury: *Kinniard* v. *Commonwealth*, 233 Ky. 347, 25 S.W. 2d 744 (1930); *Harris* v. *Commonwealth*, 233 Ky. 198, 25 S.W. 2d 369 (1930); *Clower* v. *State*, 151 Ark. 389, 236 S.W. 265 (1922); Referee in bankruptcy: *Pawley* v. *U. S.*, 47 F. 2d 1024 (C.C.A. 9, 1931); Assessor of named township: *State* v. *Cunningham*, 66 Iowa 94, 23 N.W. 280 (1885); Election inspector: *State* v. *Hopper*, 133 Ind. 460, 32 N.E. 878 (1892); Receiver of land office: *U. S.* v. *Eddy*, 134 Fed. 114 (C.C., D. Mont., 1905); Notary public: *State* v. *Eisenstein*, 10 N.J. Super. 497, 77 A. 2d 63 (1950).

There the indictment specified that the oath had been administered by the clerk of the court and the court held that it would take judicial notice of the powers of its own clerk. The *Bickford* case is in accord with the consistent body of authority which we have cited. It cannot be taken for the proposition seemingly urged by the Government that it is not even necessary to describe in any fashion the person who administered the oath. The heavy reliance placed upon the *Bickford* case by the Government is accordingly without basis.

B. *Meaning of Word "Tribunal" as Used in The Statute*

The most logical assumption is that the word "tribunal" as used in 18 U. S. C. 1621 means a court of justice. Webster's Universities Dictionary, Unabridged thus defines the word at page 1831:

> "[*Tribunal*, a platform on which the magistrates sat, from *tribunus*, a tribune, who administered justice].
>
> "1. The seat of a judge; the bench on which a judge and his associates sit for administering justice.
>
> "2. A court of justice; as, the Supreme Court is the highest tribunal."

Similar language is found in Black's Law Dictionary, Third Edition, page 1756:

> "*Tribunal*, the seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise. See *Foster v. Worcester*, 16 Pick. (Mass.) 81."

The meaning of the word seems to have been presented for decision to only one federal court, the District Court of the District of Columbia, Holtzoff, Judge, who used the following language in *United States v. Meyers, et al*, 75 F.

Supp. 486, 487, affirmed 171 F(2) 800, cert. den. 336 U. S. 912:

> "The court has considerable doubt whether a congressional committee is a tribunal, because the word 'tribunal' implies an officer or body having authority to adjudicate matters. But . . . it is not necessary to determine whether a congressional committee is a tribunal, because the statute . . . includes an oath taken before an officer or any other person authorized to administer oaths. The indictment alleges that *the oath in this instance was administered by Honorable Homer Ferguson, a member of the United States Senate, as chairman of a sub-committee.* He was certainly an officer or person authorized to administer oaths. The indictment contains allegations that the sub-committee had authority to examine witnesses under oath." (Emphasis supplied.)

It seems clear that the indictment in the *Meyers* case was sustained only because the charge was brought within the alternative language of the statute, the "officer or person" portion. It is manifest that Judge Holtzoff thought that the mere charge that the oath was taken before the Senate Committee would not have been adequate.

It is clear also that Judge Rives based his dissent (R. 25) solely on the provisions of the "officer or person" alternative of the statute. Here is his language:

> "So far as authority is concerned, any United States Senator, a member of the sub-committee, had authority to administer oaths to witnesses, 2 U. S. C. A. 191 . . . Under the holding in *United States* v. *Bickford*, 168 F(2) 26, the sufficiency of an averment that, 'the oath was administered by some senator, a member of the sub-committee', without naming him, could not be debated. The word 'duly' carried that same meaning. In all probability the defendants knew which senator acted."

That the word "tribunal" has primary reference to courts of justice is confirmed by the language of Section 5396, Rev. Stat. (18 U. S. C. 1940 Edition, 558) quoted at page 3 of the government's brief. This statute was passed in aid of prosecutions under 10 U. S. C. 1621 and constitutes a clear acceptance by Congress of the thesis that the word refers only to courts of justice:

> "In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and *by what court* and before whom the oath was taken, averring *such court* or person to have competent authority to administer the same . . ."

Reason and Logic Demonstrate That "Tribunal" Means Only Courts of Justice.

Courts have inherent power at common law to cause oaths to be administered *before* them. The rule is thus announced in 39 Am. Jur., page 496:

> "It is fundamental that every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction. Therefore, it is not necessary that there be a statute empowering the courts to administer oaths in the trial of cases. The power is implied in the jurisdiction to try cases and to receive the testimony of witnesses under oath. The judge himself may administer an oath, or he may direct anyone in his presence, in open court, to administer it, and the oath will be valid. Inasmuch as an oath derives its sanction and validity from the circumstance that it is duly administered in open court with the approval and under the control of the judge presiding, it is not necessary that the person who thus administers it be a legally appointed officer of the court."

Of course, this common law rule is subject to the fact that oaths in Federal matters can be administered only as

specifically authorized by statute. The quotation is made to exemplify the well recognized principle that all presumptions are indulged in favor of the regularity of acts of courts of justice of general jurisdiction. Certainly, no one would have the hardihood to argue that either the quoted language or the principle would warrant any such presumption with respect to commissions or other bodies of limited statutory jurisdiction.

A court of justice has permanent status and situs. A Senate subcommittee has neither. A Senate committee is both transitory and ambulatory. A court of justice belongs to the ages; a Senate sub-committee to the whims of the passing moment.

A defendant called upon to investigate an indictment for false swearing before a court knows exactly where to go and whom to approach to ascertain the details of person and place with respect to the supposed oath. A defendant called upon to answer an indictment for false swearing before a sub-committee, unless given the name of the person administering the oath, would be placed under severe handicap in making his investigation. The objection of respondents is not captious in any degree, but goes to the very basis of the mechanics of defending charges of crime.

A Multitude of Federal Oath-Givers

An examination of the Federal statutes which does not claim to be complete turns up seventy-one separate sections of U. S. C. A. which confer the authority to administer oath.* In most instances, each statute confers the author-

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* The following references are to U. S. C. A.: Title 2, Sec. 23 and 24; Title 5, Sec. 16(a), 18, 19, 92, 92(a), 93, 93(a), 97, 137 Supp.), 365, 498 (Supp.) 521, 634, 780, 1006 (Supp.); Title 7, Sec. 420; Title 8, Sec. 207(f) and 455; Title 10, Sec. 1586; Title 11, Sec. 66; Title 14, Sec. 26 and 27; Title 15, Sec. 49, 77(h), 77(s), 77(uuu), 80(b-9); Title 16, Sec. 454, 656, 825(f); Title 18, Sec. 6(c) and 4004; Title 19, Sec. 1333, 1486, 1509; Title

ity on a large number of persons. These authorizations cover expense accounts, registration of aliens, investigations in federal prisons and by custom officers, post office inspectors and the like, hearings before the Civil Service Commission, panels of the Labor Board and like groups and a field of activities of immense breadth and scope. Such a situation as this, then relatively simple, caused this Court to emphasize in *United States* v. *Curtis*, *supra*, that an indictment must show clearly that the person essaying to administer an oath had the statutory authority to administer that particular oath.

A large number of the statutes enumerated relate to oaths before multiple persons engaged in the particular matter in hand. These include such bodies as the Civil Service Commission, Securities and Exchange Commission, Committee on Government Reorganization, and include the manifold groups which go out from the seat of government conducting hearings in connection with the intricate problems and relationships of the Federal government.

Is each of those a "tribunal" within the scope of 18 U. S. C. 1621? Would it be sufficient for an indictment to charge a defendant with having sworn falsely "before" one of those congregations of persons? The question answers itself. It is manifest that the "competent tribunal" portion of the statute does not cover those wide-spread activities. They are covered by the other alternative of the statute, "officer or person". The oath is administered in every instance by an individual given authority to administer it by Federal statute. One seeking to charge a crime under such

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22, Sec. 270; Title 25, Sec. 33 and 376; Title 26, Sec. 1114, 3614, 3632, 3654, 3965, 5010; Title 28, Rule 43, Sec. 459, 548, 637, 792; Title 29, Sec. 161 and 195; Title 31, Sec. 117 and 230; Title 32, Sec. 94; Title 34, Sec. 1200—Article 69; Title 38, Sec. 131; Title 39, Sec. 704; Title 42, Sec. 272; Title 43, Sec. 75 and 1117; Title 45, Sec. 154 and 157; Title 46, Sec. 239 and 826; Title 48, Sec. 31 and 199; Title 50, app. Sec. 922(a), 1822(a) 1931.

a statute is bound to give the name of the office and to show that the person named had authority to administer that particular oath.

The present indictment does not charge that the tribunal had any authority to administer the oath, and does not name either the officer or the person charged with having given it; and it does not set forth that the oath was administered with authority or the source of that authority.

The tendency to draw a line between oaths in judicial proceedings and those in non-judicial proceedings is well established and is based on good reason. Corpus Juris Secundum thus treats of it in Vol. 70, p. 508:

> "Ordinarily an indictment or information for perjury or false swearing should show by whom the oath was administered, but the name of the officer administering it need not be alleged where the offense was committed in a judicial proceeding."

While that line is clearly drawn, the court is not required, in this case, to hold that the word "tribunal" in the statute embraces only Courts of Justice. It is sufficient to recognize that 18 U. S. C. 1621 provides for two classes of perjury prosecutions: those based upon false swearing in a tribunal of such character that it is sufficient that the oath be administered "before" it; and those based upon false swearing in a proceeding before one person or a group of persons wherein the statute provides only for the administering of the oath by a designated officer or person.

2 U. S. C. 191 belongs in the latter category,—and it is conceded that it is the only statute authorizing the oath involved here. This statute confers oath-giving powers only on the individual members of Congressional Committees. Even if it be assumed that Congress could have provided that an oath administered "before" a congres-

sional committee was sufficient, the answer is that Congress did not choose to do so; but chose rather to vest the power to administer the oath solely in its individual members.

It should be emphasized that a decision recognizing the above would not tend to weaken the perjury statute or make more difficult the drawing of indictments under it. The addition to the present indictment of the simple statement that the oath was administered by a named member of the committee having authority to administer it would have insured its adequacy while, at the same time, giving the defendant information vital to his defense and guaranteed to him by the Constitution.

C. *Indictment in the Language of the Statute is Not Sufficient*

The government relies heavily on the rule, mistakenly claimed to be of universal application, that ordinarily it is sufficient to charge a crime in the language of the statute. Both opinions in the court below point out that this rule does not apply here because the statute does not spell out all of the essential elements of the offense.

This Court has stated that rule so clearly and so many times that it has become axiomatic. Here is the way the Court expressed the rule in *United States* v. *Carll*, 105 U. S. 611:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature does not dispense with the necessity of alleging in the in-

dictment all the facts necessary to bring the case within that intent."

In *Armour Packing Company* v. *United States*, 209 U. S. 56, very much the same thing was said:

> "Authorities are cited to the proposition that, in statutory offenses, every element must be distinctly charged and alleged. This court has frequently had occasion to hold that the accused is entitled to know the nature and cause of the accusation against him . . . so that it may be decided as to their sufficiency in law to support a conviction. . . . And it is true that it is not always sufficient to charge statutory offenses in the language of the statute, and where the offense includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars."

To those cases should be added *United States* v. *Simmons*, 96 U. S. 360, *Cochran* v. *United States*, 157 U. S. 286, *United States* v. *Hess*, 124 U. S. 483, *Evans* v. *United States*, 153 U. S. 584, *United States* v. *Cruikshank*, 92 U. S. 542, and a number of other decisions referred to elsewhere in this brief.

Moreover, it is clear, as pointed out by the opinion in the court below, that the language of the statute was not followed by the indictment now before the Court.

D. *The Cases Cited by the Government Are Not Convincing*

No case cited by the government tends to sustain the thesis that a perjury indictment is good which does not charge that the "tribunal" had authority to administer the oath or to have the oath administered before it, and does not identify the person alleged to have administered the oath either by giving his name or the office held by him, and does not charge that such person had authority to

administer the oath. A glance at two or three of the cases relied on by the government will suffice to show this.

In the *Bickford* case, *supra*, the indictment charged that the oath was taken before the United States District Court and was "administered by the clerk of said court . . . ". There, the prosecution was before a court having inherent power to cause the witness to be sworn and the indictment went further and charged that the oath was administered by the clerk of the court. Judicial notice supplied the name of the clerk and the statute spelled out his authority.

It would be a work of supererogation to point out that none of these important factors are present here. The fact that the government is forced to rely on the *Bickford* case shows how barren has been its search for supporting authority.

United States v. *Polakoff*, 112 Fed. 888 has no tendency to support the government's contention here. The charge there involved was the impeding and influencing of an officer. It was a crime to impede or influence *any officer*. The crime was completely charged when the indictment set out that the defendant had influenced a government officer. His identity was not a matter of essence. Not so here. Every officer can not administer an oath. It was necessary to identify the officer so that the court could examine the statutes and determine whether he had authority to administer an oath. The identity of the officer here is, therefore, essential.

II

The Sixth Amendment Requires That Every Essential Ingredient of Perjury Be Charged in the Indictment

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions the accused shall * * * be informed of the nature and cause of the accusation."

The content of this provision has been made clear by the cases as including a number of elements, most clearly expressed in *U. S. v. Cruikshank*, 92 U. S. 542, 558:*

> "The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, *second, to inform the court of the facts alleged, so that it may decide whether they are sufficient to law to support a conviction, if one should be had.*" (Emphasis supplied.)

Chief Justice Marshall made the same point in *The Hoppet v. U. S.*, 7 Cranch 389, 394-395, declaring as reasons for the rule that—

> "the accusation on which the prosecution is founded should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced . . .";
>
> "1. That the party accused may know against what charge to direct his defense.
>
> "2. That the court may see with judicial eyes that the fact alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense. * * *"

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* See in accord: *U. S. v. Hess*, 124 U. S. 483, 487; *Brenner v. U. S.*, 287 F. 636, 640 (C.C.A. 2, 1922); *Kaufman v. U. S.*, 282 F. 776 (C.C.A. 3, 1922), cert. den. 260 U. S. 735; *U. S. v. Winnick*, 151 F. 2d 56 (C.C.A. 7, 1945); *Harper v. U. S.*, 143 F. 2d 795 (C.C.A. 8, 1944); *Fontana v. U. S.*, 262 F. 283, 286 (C.C.A. 8, 1919); *Goldberg v. U. S.*, 277 F. 211 (C.C.A. 8, 1921); *Buck v. U. S.*, 277 F. 220 (C.C.A. 8, 1921); *Weisman v. U. S.*, 277 F. 221 (C.C.A. 8, 1921), cert. den. 258 U. S. 618; *Elder v. U. S.*, 142 F. 2d 199 (C.C.A. 9, 1944); *Carter v. U. S.*, 142 F. 2d 199 (C.C.A. 9, 1944); *U. S. v. Ferranti*, 59 F. Supp. 1003 (D.C., N.J., 1944); *U. S. v. Armour & Co.*, 48 F. Supp. 801 (D.C. Okla., 1943); *U. S. v. Allied Chemical & Dye Corp.*, 42 F. Supp. 425; *U. S. v. Olmstead*, 5 F. 2d 712, 714 (D.C. Wash., 1925); *U. S. v. Greenbaum*, 252 F. 259 (D.C., Mich., 1918); Cooley's Blackstone, 4th Ed., Bk. IV, p. 306 (1899); 42 C.J.S. 836.

It will be observed in the Government's brief that whenever it deals with the function of an indictment it refers only to the first of such objects as set forth in the *Cruikshank* and *Hoppet* cases, *supra*, namely, adequate notice of the charge against the accused and prevention of double jeopardy. It studiously ignores the second and equally important object of an indictment, namely, to permit the court to determine on the face of the indictment whether the facts alleged "are sufficient in law to support a conviction, if one should be had".

The right of an individual to have *the court determine as a matter of law* whether the facts alleged constitute a crime is not a right to be lightly dismissed. It is of the essence of the underlying historical basis for the Sixth Amendment that persons must be safeguarded from being harassed for "pretended offenses".[10] As this Court held in *Adams* v. *U. S.*, 317 U. S. 269—

> ". . . procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty, or property'."

In perjury prosecutions one of the sharpest issues frequently surrounds the authority of the person to administer the oath. That was the issue in *U. S.* v. *Curtis*, *U. S.* v. *Hall*, *Markham* v. *U. S.*, *Hilliard* v. *U. S.*, *Danaher* v. *U. S.*, *Travis* v. *U. S.*, *Levy* v. *U. S.*, *and U. S.* v. *Doshen*, all *supra*. For, as the Court of Appeals for the Third Circuit pointed out in the *Doshen* case, *supra*:

> "An oath taken before an officer who has no legal authority to administer it cannot serve as the basis of an indictment for perjury. * * * This Court will

[10] See Declaration of Independence.

> not draw inferences with respect to the nature of the investigation. A defendant in a criminal case is entitled to an indictment unequivocally setting forth the elements of the crime with which he is charged." (133 F. 2d at pp. 758 and 760.)

The indictments in the instant cases completely eliminate that question as a legal issue to be tested on the face of the indictment by the simple device of not mentioning the matter.

A demurrer, or a motion to dismiss in the nature of a demurrer,[11] is a substantive right, not a procedural technicality. It is deep rooted in Anglo-American law as a method by which both the accused and the court can escape the expense and harassment of trial by determining, in advance of the trial, whether the indictment does, in fact, charge an offense for which the accused can be brought to trial. The importance of the right to challenge a pleading or indictment by demurrer is well indicated at 71 C. J. S. 426:

> "A demurrer is not a mere procedural nicety, but is a precise instrument for the final determination on the merits of justiciability under pertinent rules of law of an asserted cause of action or defense."

The Government attempts to approach this matter of the identity and authority of the person administering the oath as one of "insignificant detail"; and alleges that the identity of the person administering the oath may be obtained by a bill of particulars. The difficulty with the Government's argument is that the authority of the person who administered the oath goes to the very essence of the crime. Matter in a bill of particulars can neither buttress an insufficient indictment, nor be used as part of a motion to dismiss an

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[11] Rule 12a, Rules of Criminal Procedure.

indictment for insufficiency.[12] Upon the Government's theory, the defendant could never in advance of the trial raise an issue of law as to the authority of the person who allegedly administered the oath. It would not appear in the indictment; and if it appeared in a bill of particulars, could not be used as a basis for attacking the indictment. And as the defendant would be barred, so would the Court be prevented from testing upon the fact of the indictment one of the most decisive legal questions involved in perjury prosecutions.

The suggestion by the Government raises a further constitutional question. The Fifth Amendment contains the clear mandate that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The Government's proposal, if adopted, would mean that an essential averment of an indictment had been provided by the prosecutor, rather than by the grand jury under oath, and would squarely reverse the holding in *Ex Parte Bain*, 121 U.S. 1. Cf., *U.S.* v. *Norris*, 281 U.S. 610, 622; *U.S.* v. *Fawcett*, 115 F. 2d 764, 766 (C. C. A. 3, 1940); and see 132 A. L. R. 404.

The Government further contends that, in any event, because the oath was taken before a "tribunal" which had authority to administer the oath, "the particular person who administered the oath for the tribunal becomes an insignificant detail, particularly where, as here, the com-

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[12] See: *Dunlop* v. *U. S.*, 165 U. S. 486, 491; *U. S.* v. *Comyns*, 248 U. S. 349, 353; *Floren* v. *U. S.*, 186 F. 961, 964, 108 C.C.A. 577; *Local 56 of Internat'l. Fishermen* v. *U. S.*, 177 F. 2d 320, 326 (C.C.A. 9, 1949); *U. S.* v. *Lynch*, 11 F. 2d 208 (D.C. La., 1926); *U. S.* v. *McKay*, 45 F. Supp. 1007 (D. C. Mich., 1942). Of course, only matters not involving essential elements of the crime charged may be supplied by a bill of particulars. *Hood* v. *U. S.*, 23 F. 2d 472 (C.C.A. 8, 1927), cert. den., 277 U. S. 458. Cf., 42 C.J.S. 1101-1102, 1222; Joyce on Indictments, 2d Ed., Sec. 326, p. 363. This is conceded by Judge Rives in his dissent in the present case.

petency and authority of the tribunal to administer oaths *through its members* is well established."

The confusion here is patent. While concededly the Senate subcommittee has the authority to interrogate witnesses under oath, and while concededly a United States Senator would have authority to administer the oath, nothing in the indictment suggests that it was, in fact, a Senator, rather than any of the coterie which normally surrounds a Senate committee, who actually administered the oath. Possibly, counsel for the committee, or a secretary to the committee, undertook this function. On this, the indictment is completely silent.

It is thoroughly acceptable, as in the *Bickford* case, *supra*, for the court, from the *fact* alleged that the clerk administered the oath, to take judicial notice that the clerk had authority to administer it. A statute book would give the answer as to such authority. But here, what is the *fact* from which it can be ascertained that the oath was properly administered? Is it merely that the defendant appeared before a subcommittee? The missing link in the Government's reasoning is that there is no allegation at all that a member of the subcommittee did, in fact, administer the oath. Thus, a statute book will tell the court the unchallenged fact that a United States Senator can administer the oath, but will utterly fail to answer the real question herein: Did he do so in this particular case?

The full answer to the Government's argument on this point is found in what this Court said in *U.S.* v. *Ross*, 92 U.S. 281, 283:[13]

> "These seem to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They

[13] See also: *Nations* v. *U. S.*, 52 F. 2d 97, 105 (C.C.A. 8, 1931); *Wesson* v. *U. S.*, 172 F. 2d 931, 936 (C.C.A. 8, 1949).

are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain."

Furthermore, the Government, pointing to the statute, says that all that is required is that the defendant shall have taken an "oath" before a competent "tribunal" and that since the indictment charges that an oath was duly taken, that is sufficient. But an oath is not "taken" unless administered by a person having authority so to do. No amount of swearing before a person not authorized to take an oath can form the basis of a perjury prosecution. The statute in the precise language has always been held to require the setting forth of the identity of the person who actually administered the oath so that it may be ascertained whether an "oath" was, in fact, "taken".

And the word "duly" on which the Government places such heavy weight is, of course, purely conclusory in nature and affords no basis for factual determination that an oath was, in fact, administered."

In sum, then, the net effect of the indictments in the cases herein is to remove from each defendant and from the court any possibility of testing on the face of the indictment the authority of the person to administer the oath. Since, as we have pointed out above, one of the decisive functions of the indictment is to permit both the court and the defendant to put to test whether every element of the

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[14] The word "duly" "imports but a conclusion relating only to the formalities observed or nonobserved, and tenders no issue." 26 C.J.S. 586. And see *James A. Hearn & Son* v. *U. S.*, 8 F. Supp. 608, 609, 80 Ct. Cl. 260 (1934); *General Talking Pictures Corp.* v. *Hyatt*, 114 Utah 362, 199 P. 2d 147, 149 (1948); *Velson* v. *Green*, 64 N.Y.S. 2d 845, 847 (1946); *Jones* v. *Alan Porter Lee, Inc.*, 259 App. Div. 114, 18 N.Y.S. 2d 231, 232 (1940).

crime is charged, and since the authority of the person to administer the oath is concededly an essential element of the crime, the indictments, if sustained, would seriously breach the protections guaranteed by the Sixth Amendment.

III

Indictment May Not Proceed by Presumption or Implication

The government, in the court below, called upon three presumptions or conclusions to rescue the indictment from dismissal. The dissenting opinion embraces all three, and the government now asks this Court to follow the dissent and reject the main opinion:

1. From the averment of a "competent tribunal," this Court is asked to conclude that the defendant could be sworn by anyone at all, so long as the swearing was "before" the "tribunal."

2. From the use of the adverb "duly," the Court is asked to imply that the swearing was done by a senator who was a member of the sub-committee.

3. From the fact that the grand jury indicted him, the Court is called upon to presume that "in all probability, the defendant knew which senator acted."

It is not enough that the "tribunal" be competent, that is, legally organized so as to be empowered to summon witnesses, hold hearings and receive testimony. Cf. *Chrisoffel* v. *United States*, 338 U. S. 84. The tribunal must have authority to swear the witness or its authority must be such as to invest the act of swearing "before" it with legality, regardless of the person administering the oath or whether he is possessed of independent authority. The indictment does not charge that the tribunal was cloaked with any authority at all to swear a witness and no statute is pointed out conferring such power on the

tribunal. The conclusion of the pleader does not save the indictment.

The dissent which the government asks this Court to follow candidly relies on the word "duly" to supply the essential ingredients of perjury:

> "Further it [the indictment] charges that the oath was 'duly' taken (a fact not noted by my brothers). . . . So far as authority is concerned, any United States Senator, a member of the sub-committee had authority to administer oaths to witnesses. . . . The word 'duly' carried that same meaning."

On the basis of the government's argument thus accepted and epitomized by the dissenting judge, this Court is asked to *imply* that "duly" carries into this indictment the averment of these essential *facts* not otherwise mentioned in it: Having been given the oath by Senator ——, a member of said sub-committee, having authority to administer the same.

Presumably from the fact that the defendant has been indicted by the grand jury, this Court is asked to fill in the name of the Senator in the foregoing quotation on the ground, argued by the government and adopted by the dissent, that "in all probability, the defendants knew which senator acted."

If the presumption of innocence and lack of knowledge on the part of the defendants is to be laid aside, one could, with equal logic, speculate that the defendants probably knew the identity of the tribunal and also what they had sworn. But the Court will not deny to the defendants this presumption so venerated as one of the basic safe guards of our way of life in this Republic. In *Coffin* v. *United States*, 156 U. S. 532, this Court held that "the principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary,

and its enforcement lies at the foundation of the administration of our criminal law."

In that case, Mr. Justice White pointed out that this presumption was traceable to Deuteronomy, that it was substantially embodied in the laws of Sparta and Athens and that the Roman law was pervaded with this maxim of criminal administration. He traced the principle through the English law and showed how it is one of the main foundation stones of the liberties of our peoples. It is not necessary to trace the holdings of this Court on so palpable a point. The application of the rule to the testing of the sufficiency of an indictment subjected to demurrer (motion to dismiss) is well set forth by the Court of Appeals for the Eighth Circuit in *Lynch* v. *United States*, 10 F. (2) 947, 949:

> "Where one is indicted for a serious offense, the legal presumption is that he is not guilty; that he is ignorant of the supposed facts upon which the charge is founded. A demurrer to the indictment must be considered and determined on that presumption, on the presumption that the defendant does not know the facts, that the prosecutor thinks make him guilty . . ."

The same court, in *Keller* v. *United States*, 133 Fed. 337, again stressed the presumption of ignorance and further defined the nature of the presumption:

> "He [the defendant], is unable to secure and present the evidence in his defense . . . unless the indictment clearly discloses the facts upon which the charge of the commission of the offense is based. It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he is to meet, so fully as to give him a fair opportunity to prepare his defense, . . . and so clearly that the court, upon an examina-

tion of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction. *United States v. Hess*, 124 U. S. 483, 486, 487, 488."

In 16 Corpus Juris 530, Criminal Law, Par. 1015 (2) it is stated: "In accordance with the presumption of innocence, accused is presumed to be ignorant of what is intended to be proved against him, except as laid in the indictment." To the same effect, see *Sutton v. United States* (Fifth Circuit), 157 F. (2) 661, *Fontana v. United States*, 262 Fed. 283 and the other authorities cited, *supra*.

"Legislation may proceed by implication but good pleading may not," so stated the court of the Fifth Circuit in *Robertson v. United States*, 108 F. (2) 294. Substantially the same thing was said in *United States v. Carll* and *United States v. Hess, supra*.

The shortage of printer's ink does not seem to have coincided with the passage of Rule 7(c). The government set forth the necessary details in the *Bickford* case and in the *Meyers* case and others and did not give itself over to indictment by implication until after the Rules of Criminal Procedure had gone into effect.

The use of the word "competent" can not buttress the indictment as the court will look to the fact charged, that the "tribunal" was a Senate sub-committee and will reach its own conclusion from that *fact*. The same is true of the use of the adverb "duly." The use of that word connotes that the draftsman of the indictment looked upon certain supposed facts, and concluded that they spelled out such propriety and legality of action that he could set them forth by the use of that word, withholding the facts for which the adverb essayed to stand. The law requires that the *facts* appear in the indictment so that the defend-

ant may know them and that the court may judge them. That is the very genius of Rule 7(c).

In *Fontana v. U. S.*, 262 F. 283 (C. C. A. 5, 1919), the court said (at p. 286):

> "When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charge, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading."

The presumption that a defendant is not only innocent but that he has no knowledge of the facts constituting the crime with which he is charged means, when applied to a charge of perjury, that the defendant does not know that he was sworn at all. Accordingly, he must be told the identity or office of the human being who swore him so that he can ascertain the facts charged against him.

The same principle is followed in other essential parts of an indictment. The question of venue is an apt example. The crime must be laid within a certain jurisdiction. Why is that necessary? Surely a man charged with murdering Jim Jones does not have to be told where the murder was committed if it is proper to assume any knowledge as to the alleged murder on his part? Yet venue is one of the essential facts. So is the name of the person murdered. Certainly, a man charged with the crime of murder would know the identity of the person he murdered, had he, in fact, committed the crime. Nevertheless, he must be told the name of that person in the indictment.

The reason for these requirements in the cases of venue and of the name of the person murdered is clear. The indictment cannot assume guilt on the part of the accused. The presumption of innocence necessarily imports the cor-

related presumption of total lack of knowledge of any of the elements of the offense charged. Thus, the Government is in error in contending that the indictments herein could properly dispense with showing on their face the identity and authority of the person administering the oath. No knowledge can be imputed to the defendants so as to overcome the fatally defective omissions in the indictments.

IV

Effect of Repeal of R.S. 5396 (28 U.S.C. 556)

1. The Government argues that, by reaching back to a repealed statute (R. S. 5396, which required a perjury indictment to allege "before whom the oath was taken") to determine the sufficiency of an indictment as a pleading, the holding below has imported into modern criminal pleading outworn *technical* concepts which the Rules of Criminal Procedure were intended to abolish. But a review of the history of R. S. 5396 will show that the court has certainly not reached back to a repealed statute but has simply given effect to accepted principles of modern pleading.

It is clear that perjury historically had become so encrusted with details, prior to enactment of 23 Geor. II, Chap. 11, that indictments for perjury were being dismissed on grounds that did not go to the substance of the offense, but instead to the omission of evidentiary details. This process of encrustation with unnecessary and merely formal detail is well described in Chitty, Criminal Law, Vol. II, 5th Amer. Ed. (1947), Ch. IX, Perjuries, at p. 306:

> "Indictment.—In former times, indictments for perjury were exceedingly prolix and dangerous. Thus, an information on the Statute of Elizabeth, set forth the statute itself, the pleadings in an action of ejectment, the issue joined, the proceedings on the trial, the whole

evidence and the assignment of perjury upon it. Co. Ent. Inform. 367. But, in order to facilitate prosecutions for perjury, which have frequently been unsuccessful in consequence of formal defects, it was enacted by 23 Geo. 2, Ch. 11, that in every indictment and information for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken (averring such court or person or persons to have a competent authority to administer the same * * *."

Thus, the English statute was passed to limit perjury to the essential elements of the crime. As Chitty states (p. 307), "The substance of the charge is intended in opposition to all its details". Our American statute (28 U. S. C. 558) adopted the English statute.

Instead of stating what elements were required to constitute the crime of perjury, Section 558 limited itself to stating that "it shall be sufficient to set forth" stated elements of the crime. The statute thus merely set forth the minimum essentials of a valid indictment for the crime of perjury, thereby enabling prosecutors to determine what immaterial facts could safely be omitted from the averments of the indictment.

In thus restating the minimum constituents of a valid indictment for perjury, the statute long served a useful purpose. That function lost its significance when Rule 7(c) of the Federal Rules of Criminal Procedure was adopted.

Rule 7(c) sets forth as a rule of general application to all criminal statutes, the same principle that had heretofore been set forth specially for perjury alone in Section 558, i.e., that it is sufficient in an indictment to state the essential facts constituting the offense charged.

Of course, the repeal of a statute whose only mission was to minimize the requirements of an indictment does not

carry the presumption that those minima were thereby further diminished. It is more logical to conclude that Congress considered it no longer needed a separate statute having special application only to the crime of perjury when it had a general statute which performed precisely the same function for all criminal offenses, and therefore necessarily applied also to the crime of perjury.

The prime efficacy of 28 U. S. 558 lay in the things it permitted the government to leave out of an indictment. It granted leave that an indictment might contain the substance of the materiality of the false swearing, omitting the details, and might omit entirely the pleadings and record of proceedings and the commission of the person before whom the oath was taken.

It is rather to be assumed, therefore, that Congress felt free to leave that statute out of the revised code because it was assured that the courts would, under Rule 7(c), grant to the government the right to omit from the indictment those things which the language of the statute had stamped as non-essential.

There is no ground at all for the assumption that Congress intended that the courts applying Rule 7(c) should exempt the government from the necessity of charging all of the essential facts of perjury which had been accepted as standard throughout the life of the nation, and which Section 558 recognized as established substantive law.

2. The most significant thing that can be said of Section 558 is that its acceptance of the requirement that a perjury indictment must set forth "by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same," and its re-enactment unchanged for more than a century and a half, helped to crystalize the quoted requirement into a principle of law of universal acceptance.

3. There is no merit, therefore, to the government's contention that the omission of Section 558 from the recodification of 1948, and that the supposed substitution of Rule 7(c) for it carries the presumption that Congress intended to reject entirely the legal principle so long recognized by the statute. Quite the contrary is true under the holding of this Court in *Morissette v. United States*, 342 U. S. 246, 96 L. Ed., 288.

Under consideration there was the effect of the omission of *intent* from the recodification of the law against embezzlement, larceny, and similar crimes which Congress had effected in the new statute, 18 U. S. C. 641. Morissette had contended that "both the indictment and the statute require proof of felonious intent". The Court of Appeals of the Sixth Circuit rejected that contention, 187 F(2) 427, 428, holding that it was the manifest purpose of Congress to drop *intent* as an ingredient of the offense. That Court held the indictment good under Rule 7(c), feeling that "the federal courts long ago abandoned the course of reversing convictions for crime on the technical niceties of pleadings".

This Court reversed, using language of similar import to that employed by the District Court in its opinion in this case (R. 13):

> "As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle, but merely recognized that intent was so inherent in the idea of the offense that *it required no statutory affirmation* . . .
>
> "And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken, and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case,

absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them . . ."

The elements of perjury long construed in accordance with the provisions of Section 558 remain the same when it is to Section 7(c) of the Federal Rules of Criminal Procedure that one turns instead for the controlling standard for sufficiency of the perjury indictment. As Mr. Justice Frankfurter has observed:

> "Words of art bring their art with them. They bear the meaning of their habitat whether it be a phrase of technical significance in the scientific or business world, or whether it be loaded with the recondite connotations of feudalism. Holmes made short shrift of a contention by remarking that statutes used 'familiar legal expressions in their familiar legal sense'. The peculiar idiom of business or of administrative practice often modifies the meaning that ordinary speech assigns to language. And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Frankfurter, "Reading of Statutes", 47 Col. L. Rev. 527, 536 (1947).

V

The Government Misconstrues the Purpose and Effect of Rule 7(c)

1. Rule 7(c) is not entitled to be construed as having an effect as cataclysmic as that with which the government seeks to invest it. It did not spring "full-fledged" from the mind of Congress as Pallas is reputed to have sprung from the head of Jove. It is rather the synthesis of its prototype, 18 U. S. C. 556, plus the evolution wrought by the courts under it. This Court had long since sanctioned a departure from "the rigor of old common law rules of criminal pleading" in a line of cases of which *Hagner* v.

United States, 285 U. S. 427, 76 L. Ed. 861, is an example. The Court of the Fifth Circuit had been in the forefront of those which were studious to deny to defendants "A vested right in the veteran absurdities of criminal procedure"; *Whitehead* v. *United States* (1917) 245 F. 385. And see *Wilson* v. *United States* 158 F (2) 659; cert. den. 330 U. S. 850; *Robertson* v. *United States*, *supra*, and *Parsons* v. *United States*, 189 F. (2) 252.

Moreover the Government suggests a meaning for Rule 7(c) which its framers expressly disavowed. Rule 7(c) was designed to eliminate prolixity of pleading and ancient encrustations which prosecutors were fearful of eliminating. By its very language, however, the rule expressly requires that all of the essential facts of the crime charged must be alleged. In addition, those who took part in the framing of the rule made it clear that there was no intention of adopting the so-called "short form" of indictment.

Thus, the Government relies heavily on Holtzoff, *Reform of Federal Criminal Procedure*, 3 F.R.D. 445, 448-449. Judge Holtzoff there states merely that the intention of Rule 7(c) is the "simplification of indictments and informations" since the "prolix and archaic form of indictment couched in Elizabethan English is still used in the federal courts. Actually, instead of apprising the defendant of the crime of which he is accused, an indictment of this sort tends to mystify him." (At p. 448). Judge Holtzoff emphatically emphasizes that this simplification satisfactorily meets the rigid test of the:

> ". . . necessity of preserving and safeguarding the fundamental rights of the accused. These rights, which are derived from the basic Anglo-Saxon principles of fair play and are in part embodied in the Constitution of the United States, are intended, first, to protect the innocent against an erroneous conviction, and, second,

to assure the use of civilized standards in dealing even with the guilty." (At p. 446).

And Judge Holtzoff states further at page 447:

"The simplification of procedure has been accomplished, however, without sacrifice of any safeguard that properly surrounds a defendant in a criminal case."

Clearly, an averment held necessary by this Court in *U. S. v. Hall, supra*, and *U. S. v. Markham, supra*, as well as by every federal appellate court which has spoken on the subject, and by innumerable state courts, is a safeguard surrounding a defendant that, under any use of language, comes within this assurance by Judge Holtzoff.

An essential part of the Government's argument is that the identity and authority of the person administering the oath can be properly provided by a bill of particulars. Judge Holtzoff, however, made it plain that Rule 7(c) does not envisage that type of indictment. He said at page 449:

"The form adopted by the committee is not what is technically known as the short form indictment, which merely names the crime with which the defendant is charged, by its legal term, without specifying or summarizing the facts of the offense. The Committee deliberately rejected indictments of this type, because they are apt to *evoke motions for bills of particulars and thereby constitute a source of unnecessary delay.* A simple indictment, briefly and succinctly setting forth the facts of the specific crime, seems preferable."

Precisely to the same effect is the comment by Arthur T. Vanderbilt, Chairman of the Advisory Committee. See, Vanderbilt, 29 A.B.A. Jour. 376, 377 (1943):

"A simple form of indictment is proposed which constitutes a compromise between the present prolix

document and the extremely short form. The objection to the latter is that it almost invariably evokes a motion for a bill of particulars and *thereby is productive of delay*. The form preferred by the committee is one that states the essential facts constituting the offense but omits the formal averments and useless embellishments with which old-time draftsmen have been wont to adorn their product."

Homer Cummings stated (29 A.B.A. Jour. 654 (1943)):

"The framing of a set of rules of criminal procedure is a difficult business. The protection of the individual members of society against crime is one of the fundamental purposes for which government exists; and yet that purpose cannot be adequately served if the mechanism of justice is out of joint. For many years, useless and archaic technicalities, the product of a bygone day, have delayed and hampered and at times even frustrated the successful administration of the criminal law. While concerning ourselves with efficiency and expedition, great care must be taken to avoid the impairment of any of the just rights of the accused. Naturally, this protection must be in accord with the fundamental concepts of Anglo-American jurisprudence, which surrounds the defendant in a criminal case with certain well-defined safeguards."

George H. Dession, in *The New Federal Rules of Criminal Procedure*, II, 56 Yale L. J. 197, 206 (1947), states:

"The Rule [Rule 7(c)] does not institute the 'short form' type of pleading sanctioned in some of the states, which presupposes the furnishing of a bill of particulars to round out the minimum of information to which a defendant is entitled before being called upon to plead. *The pleading here contemplated would be complete in itself.*" (Emphasis supplied.)

William W. Barron says in Proceedings of the Institute on Federal Rules of Criminal Procedure, held at the Catholic University School of Law, 5 F.R.D. 150, 152:

> "The sufficiency of the accusation is to be tested in the light of the presumption that the accused is innocent and without knowledge of the facts charged. [Citing *Fontana* v. *U. S.*, 262 F. 283 (C.C.A. 8, 1919).]
>
> "The indictment or information must set forth every ingredient of the offense with sufficient clearness, precision and certainty to apprise the accused of the crime charged, to enable him to prepare his defense, and to permit him to assert the judgment in bar of a subsequent prosecution."

And Mr. Barron states at page 154:

> "In conclusion, it may be truthfully said that the Rules relating to the grand jury and to indictments and information are in principle substance but a restatement and simplification of existing procedural law. Those changes which have been noted could all have resulted from enlightened judicial interpretation of existing provisions of law."

George Z. Medalie states (Federal Rules of Criminal Procedure with Notes and Institute Proceedings, N. Y. U. School of Law, Proceedings, Vol. VI (1946) p. 157:

> "Now I don't think we said anything new in telling how an indictment or information may be drawn. You would think from the fact that we said it that we invented a new way for drawing up indictments or informations. Rule 7, subdivision (c) says that the indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. Now, it could always be that. There was never a time when it couldn't be. • • • I don't know whether we can succeed except by moral suasion in getting the indictment to be con-

cise and definite, instead of prolix, verbose, and involved. * * *"

It is clear beyond dispute from consideration of these authoritative statements that Rule 7(c) represents for the entire body of criminal law, what 23 Geo. II, Chap. 11, and Rev. Stat. 5396, 18 U.S.C. 558, represented for the special crime of perjury. Rule 7(c), similarly to Section 558, sanctions the elimination of verbose, prolix and wordy statements of evidentiary facts. It does no more than that. It does not sanction the Government's position that the identity and authority of the party administering an oath have ceased to be among the essential facts constituting the offense.

Nor can the Government successfully allege that these cases were overruled because Section 558 was repealed without comment after the adoption of Rule 7(c) as part of the general recodification of Title 18 of the United States Code. The simple answer to the repeal of Section 558 is that it was recognized that it had become unnecessary because Rule 7(c) provided *for all federal criminal statutes what Section 558 had provided for a perjury indictment.* The general includes the particular; a specific statute for a particular crime was no longer necessary.

All that is necessary to harmonize the entire legislative history of these changes in federal criminal procedure is to take the common sense view that the revisers of Title 18 concluded that a particular provision as to sufficiency of perjury indictments (Section 558) was no longer necessary in view of the fact that Rule 7(c) similarly upheld the validity of indictments for all criminal offenses which stated the substance of the offense. This is a far cry indeed from concluding that the repeal of Section 558 meant that the

Government had a free hand in eliminating averments held necessary under Section 558.

2. If the Government's position as to the meaning of Rule 7(c) is to be taken seriously, the question arises, what other elements of the crime can be eliminated?

We note the Government's assurance in its brief that:

> "It is, of course, still essential under Rule 7(c) and the perjury statute that the indictment allege that the oath was taken before proper authority. If the oath was taken before a court the particular court should be specified; if before a tribunal of some other kind, the nature of the tribunal and its authority; and if before a person, his official capacity and authority."

But if the Government's position respecting the alleged permissibility of omitting any averment in the indictment as to the identity and authority of the person administering the oath has any validity, why, by the same logic, is it necessary to specify before what tribunal the oath is taken? Why, in a whole series of crimes, is it not then possible for indictments to become highly generalized statements devoid of fact, in reliance on the argument that since the indictment charges commission of a crime, the details of the alleged crime may be presumed? But this is precisely the short form of indictment which the framers of Rule 7(c), for constitutional or other reasons, expressly determined to avoid.

Approval of the strained construction of Rule 7(c) by the Government which purports to find validity in indictments which proceed by presumption and implication will not only deny constitutional rights to the particular defendants herein, but will inevitably open the door to further weakening of the safeguards historically surrounding indictments. Those safeguards are for the protection of

the innocent equally with the guilty. As this Court stated in *Edwards* v. *U.S.*, 312 U.S. 473, 483 (1941):

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. * * *"

Conclusion

It would be a mistake to approach this case with the notion that its affirmative will be an acknowledgment that "we are still enmeshed in the technicalities of common law pleading". Quite the contrary is true, and respondents rely confidently on the function and spirit of Rule 7(c). What the Court is called upon to do here is to define what are the ingredients of the crime of perjury and to test whether the *facts* spelling out those ingredients are set forth in the indictment.

The fundamental error of the draftsmen of this indictment is that he failed to grasp that the perjury statute covers two categories: false swearing in the presence of a tribunal of such character as would invest with legality any oath given "before" it; and false swearing in the presence of one person or a group of persons where the oath is required to be administered by an "officer or person" vested by statute with authority to administer it.

Congressional committees belong in the latter category because no statute clothes them with power to administer an oath or to cause it to be administered by some person whose giving of the oath is made legal solely because he gives it "before" the committee (such as is true of courts of justice). The sole source of power is 2 U. S. C. 191 which vests individual senators alone with the power to swear witnesses, thus classifying this proceeding as belonging in the "officer or person" category and not in the "tribunal" category.

The two divisions of the perjury statute are of equal dignity and efficacy. It would have been simple indeed to charge that the defendant was sworn by a named senator who was vested with authority to act because he was functioning as a member of a properly constituted committee. Many words would have been saved if the prosecutor had

grasped that simple difference. And the constitutional rights of the defendant would have been preserved.

And the spirit of Rule 7(c) would have been served well. The basic requirement of that rule is "facts",—not conclusions or inferences. Decisions under the older statute had spoken of essential elements and essential ingredients. But the rule supplanting them chose a simpler word, facts. Because the prosecutor chose to involve the defendant and the court in the complexities incident to unraveling the implications of such terms as "competent" and "duly" instead of setting forth simply the *facts* as to who gave the oath and by what authority, the court below rightly struck down the indictment and the case should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. 787 53

UNITED STATES OF AMERICA,
Petitioner,

versus

ROY F. BRASHIER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENT.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 767.

UNITED STATES OF AMERICA,
Petitioner,

versus

ROY F. BRASHIER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

The judgments of the court below were entered on April 10, 1953 (R. 25). Jurisdiction is invoked by the Government under 28 U. S. C. Sec. 1254 (1).

QUESTION PRESENTED.

Whether, in a perjury indictment, when the Government neglects, or deliberately refuses to name or otherwise identify the person who allegedly administered the oath and his authority so to do, this Court should grant

certiorari to cure the deficiency by Court decision instead of remitting the Government to its remedy by a new indictment. As the alleged offenses occured in April, 1951 no Statute of Limitations is involved.

STATUTES & RULE INVOLVED.

These are set forth in the Government's petition for the writ at pp. 2-4; the pertinent portion of each indictment is set at p. 4 petition.

STATEMENT.

It should be emphasized the oath herein is alleged to have been taken before a Sente Subcommittee, not before a Court, or the clerk thereof, or a Grand Jury, or a Notary Public. The indictment alleges the defendant "duly" took the oath before the Subcommittee, "a competent tribunal", without naming or otherwise identifying the person, whether Senator, Clerk, counsel, court reporter, Notary or what have you, who is supposed to have administered it.

REASONS WHY THE WRIT SHOULD BE DENIED.

1. The decision below is of no public importance and there is no conflict with any other circuit, *U. S. v. Bickford*,

168 F. (2) 26 not being in point. The decision below was correct in law and in common-sense.

2. The Government has an easy remedy by re-indictment, to which there is no conceivable obstacle. This Court's functions are too important to permit its utilization to repair a minor official's omissions or perhaps the Government's deliberate refusal to make a traditional and common-sense allegation—a bare legal minimum in a perjury indictment.

ARGUMENT.

By the *Crimes Act of April 30, 1790* (1 Stat. 112, 116), later *R. S.* 5396 and still later 18 *U. S. C.* (1940 Ed.) Sec. 558 Congress set forth the requirements of a perjury indictment, one of which was to be the allegation "by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same." The statute was modelled after that of 23 *George II*, Ch. 11 (7 *Brit St. at L.* (Ed. 1769) p. 221; 2 *Alexanders Brit. Stat.* p. 766; *U. S. v. Walsh*, 22 F. 644; 2 Wharton Cr. L. (12th Ed.) Sec. 1554.) and was designed to state the essential ingredients of the offense, relieving the Government of the necessity of setting forth "the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed" (1 *Stat.* 112, 116; 18 *U. S. C.*

(1940 Ed.) Sec. 558). The statute of 23 Geo. II, Ch. 11, which is still in force in the District of Columbia [1] is referred to by Wharton as "almost part of the common-law" (2 *Wharton Cr. L.* (12th Ed.) Sec. 1654) and was designed to relieve the Government of the hardship of the old practice (*U. S. v. Deming*, Fed. Cas. No. 14,945; Cf. *Danaher v. U. S.*, 39 F. (2) 325, 326). It is still in force, in an abbreviated form, in England, the *Perjury Act of 1911* (c.6) S. 11 providing that it is sufficient for the indictment "to set forth the substance of the offense charged, and before which court or person (if any) the offense was committed". (5 *Halsbury's Laws of Engl.* p. 966.)

The Government now asserts that the bare minimum requirements of 18 *U. S. C.* (1940 Ed.) Sec. 558 the successor statute has been still further whittled down by the omission of that provision in the 1948 revision of the Criminal Code. It gives no reason why Congress in 1951 re-enacted the same statute for the District of Columbia (*D. C. Code* (1951 Ed.) Ch. 23 Sec. 204), which it admits is there in full force and effect (Gov. Pet. p. 7 footnote 2). It simply says Rule 7(c) F R Cr. P was intended to abolish outworn technical concepts by providing that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Under the perjury statute, 18 *U. S. C.* Sec. 1621 it is an essential element of the offense that the oath be taken before "a competent tribunal, officer or person".

[1] It was taken over as part of the common-law of Maryland by the *Act of March 3, 1901, 31* Stat. 1189, ch. 854 Sec. 1 (2 *Alexanders Brit. Stat.* p. 766, *Deckard v. State*, 38 Md. 201) and continued in force by *D. C. Code (1951 Ed.)* Chap. 23 Sec. 204.

The indictment meets these requirements, the Government says, by alleging the oath was taken before a "competent tribunal", i.e. the Senate Subcommittee."

As the indictment does not name the "officer" or "person" before whom the oath was taken it is obvious the Government proceeds under that part of 18 *U. S. C.* Sec. 1621 dealing with oaths before a "tribunal". But it cites no authority that a Senate Subcommittee is a "tribunal". In *U. S. v. Meyers*, 75 F. Supp. 486, 487 a Federal Court held a Senate Subcommittee was not a tribunal and only sustained the indictment because it alleged the oath was taken before Senator Ferguson, the chairman of the Subcommittee, who, the court said, was obviously an "officer" or "person" under the other part of the perjury statute. The court said "the word 'tribunal' implies an officer or body having authority to adjudicate matters". Both *Webster's Unabridged Dictionary* and *Black's Law Dictionary* define tribunal as a court of justice.[1] Unless a Senate Subcommittee is a "tribunal" it follows, by definition, that the Government has not alleged an essential fact under either the perjury statute, 18 *U. S. C.* Sec. 1621 or *Rule 7(c) F R Cr. P.* The Government, it seems clear, does not propose to offer any proof at the trial that the Subcommittee is a "tribunal"; its transparent plan will be to contend that whoever administered the oath was an "officer" or a "person" under the other part of the statute. The obvious reason is that the Senate

[1] See also *12A Words & Phrases* (Perm. Ed.) p. 223 and cases cited. "Tribunal" has also been defined as "the seat of a judge; the place where he administers justice, a judicial court; the bench of judges" (*64 C. J.* p. 1303). A court is usually defined as a tribunal (*Dixon v. People*, 53 Colo. 527; *Mascall v. Drainage Dist.* 122 Ill. 620, 623; People v. Haverstrow 151 N. Y. 75, 84).

Subcommittee qua "tribunal" has no power to administer an oath; under 2 U. S. C. 191 the oath can only be administered by a living person, i.e. a Senator.

It is not only law but common-sense that the person before whom the oath was taken should be named in the indictment as held by the court below and in *Hilliard vs. U. S.* 24 F(2) 99, 100.

The Government (pet. p. 12) calls it a detail of proof which if needed can be obtained by a motion for a bill of particulars—which the Government invariably resists.[1] In *U. S. v. Rosenbaum*, D. C. U. S. for Dist. Col. No. 1722-51 the court *denied* a bill of particulars which asked for the very item in question, i.e. the name of the person administering the oath. The truth is the Government cannot guarantee what a court will grant or deny; the way to solve the problem is to avoid it by naming the person in the indictment, as was done in *U. S. v. Meyers*, 75 F. Suppl. 486; *Markham v. U. S.*, 160 U. S. 319, 320; *U. S. v. Curtis*, 107 U. S. 671; *Danaher v. U. S.*, 39 F. (2) 325, 326; *Travis v. U. S.*, 123 F. (2) 268, 269; *U. S. v. Dosher*, 133 F. (2) 757, 758; *Levy v. U. S.*, 271 F. 942 and countless other cases.[2]

An indictment alleging that the oath was taken "before a Commissioner of the United States duly appointed" was specifically held bad in *U. S. v. Wicox*, Fed. Cas. No.

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[1] As it did in the five D. C. perjury cases cited in its petition p. 7, also, courts grant bills of particulars in their discretion which will not be reversed except for abuse (*Wong Tai v. U. S.*, 273 U. S. 77, 82).

[2] Or by identifying the person i.e. the court clerk as in *U. S. v. Bickford*, 168 F. (2) 26, 27.

16,692. The distinction between indictments for perjury before a court or before an officer or person is obvious. If before a court the powers of the judge or the clerk may be judicially noticed; these are the only two persons who can possibly administer the oath in court proceedings. But if before a Subcommittee there can be no advance agreement that only a competent person such as a judge or the court clerk could possibly have administered the oath. The validity of the oath would obviously depend on who did the job and he must be a living person not an abstraction. Hence the English cases hold that if the oath is taken before a court the fact that it was taken in judicial proceedings must be alleged for this infers the presence of the judge and the clerk either of whom could function.[1] This requirement was not dispensed with by the statute of 23 Geo. II Ch. 11.[2] Where however the oath is taken before a Commissioner or on inferior court circumstances must be alleged to show the authority to administer the oath and this connotes at the very least the name of the person claiming the authority.[3]

The Government's claim that the statute regulating perjury indictments (18 U. S. C. (1940 Ed.) Sec. 558) has been repealed by Rule 7(c) F R Cr P (though not for the District of Columbia) is an irrelevancy if, as we contend, a senate subcommittee is not a tribunal.[4] But in any

[1] *Stedman's Case*, Cro. Eliz. 187, 78 E. R. 393; *R. v. Dunning*, (1871) 40 L. J. M. C. 58; *R. v. Bishop*, (1842) Car. and M. 302, 6 J. P. 218; *R. v. Overton*, (1843) 4 Q. B. 83; *R. v. Bartlett*, 1 Dow & L. 95, L. J. M. C. 127, 7 J. P. 578; *R. v. Pearson*, (1837) 8 C & P. 119; *R. v. Kennedy*, (1885) 7 Newfoundland F. R. 91.

[2] *Overton v. R.*, 4 Q. B. 83; 3 G & D 133; 12 L. J. M. 61; 7 Jur. 196.

[3] *R. v. McDonald*, (1905) 21 Cox C. C. 70; *R. v. Lawlor*, (1853) 6 Cox C. C. 187 (Ire).

[4] The Government admits (pet. p. 11) "It is of course, still essential under Rule 7(c) and the perjury statute that the indictment allege that the oath was taken before proper authority."

event the failure to re-enact the statute is unimportant. The principle, under cases already cited, is so solidly imbedded in the law that no statute is required. There are plenty of examples that omission of well-known principles from codes is no indication of repeal. Thus the principle laid down in the *Judiciary Act of 1789*, Sec. 32 that on appeal no reversal shall be had for a defect of form was not repealed by its omission from the *Judicial Code* of 1948.[1] Similarly no one has ever supposed that omission of Sec. 37 of the *Judicial Code* (28 *U. S. C.* Sec. 80) from the 1948 revision repealed the requirement that Federal Courts must *sua sponte* dismiss for lack of jurisdiction.[2] Nor did the re-enactment of 18 *U. S. C.* Sec. 641 repeal the requirement of criminal intent in embezzlement cases.[3]

There is no conflict between the decision below and *U. S. v. Bickford*, 168 F. (2) 28. The indictment there alleged the defendants testified falsely in the United States District Court for Montana and that the oath was administered by "the clerk of said court." The clerk was therefore identified; no one expects or wants his baptismal name. In the present case however no one knows who is alleged to have administered the oath, whether senator, clerk, counsel for the committee, notary, court reporter or other person. If by a senator there is no allegation he was the Subcommittee, or a member of it.[4] There is likewise no conflict with *Roberts v. U. S.*,

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[1] It was later re-inserted by the *Act of May 24, 1949* C. 139 Sec. 110, 63 *Stat.* 105, 28 *U. S. C.* Sec. 2111 because the *FRCP* applied only to District Courts (1949 *U. S. Code Cong. Serv. p.* 1272, Sec. 110).

[2] See Reviser's Notes to 28 *U. S. C. Judicial Code & Judiciary* Sec. 1359 —"omitted as unnecessary."

[3] *Morissette v. U. S.*, 342 U. S. 246.

[4] Under the rules of the senate any senator can sit on a committee or subcommittee, whether a member of it or not. With the consent of the chairman he can interrogate witnesses.

137 F. (2) 412, 414 (C. A. 4) or with *U. S. v. Polakoff*, 112 F. (2) 888, 890 (C. A. 2). The first case was under the False Claims Statute (18 U. S. C. (1940 Ed.) Sec. 80); the second was for influencing and impeding the actions of court officers. In neither case were the names of the officials the essence of the offense. In the present case the opposite is true; if the official had no authority to administer the oath there could be no offense. Hence the least we can expect is the allegation of his name, or identity and the disclosure of his authority.

Equally unconvincing is the Government's argument that the charge in the indictment that the oath was "duly" taken solves all problems. "Duly" is about as bare a legal conclusion as the law knows and *Rule 7(c) FR CP* requires facts, not conclusions.[1] "Duly" means in a proper way, or regularly, or according to law,[2] and appears to refer here to the form of the oath as distinguished from the person administering it.[3] In *U. S. v. Deming* Fed. Cas. No. 14,945 an indictment for perjury before a United States Commissioner "duly" appointed was specifically held bad for absence of essential facts.

Lastly, the District of Columbia cases cited by the Government in its brief, p. 7, *U. S. vs. Rosenbaum, Dudley, Herschel Young, E. Merl Young & Lattimore* are no argument for the grant in the present case. In all these cases the court decided the Government was right; that

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[1] *Rule 7(c)* does not allow substitution of conclusions for facts. (*Alabama Packing Company vs. U. S.*, 167 F. (2) 179, 181).

[2] *Robertson vs. Perkins*, 129 U. S. 233, 234.

[3] "Duly" has a variety of meanings *18 Words & Phrases, Perm. Ed.* pp. 606-609; pocket part 1953 p. 168. In pleadings "duly" is a pure conclusion of law. (*Scott v. Chicago*, 205 Ill. 281, 68 N. E. 736, 737, 740; *Hanson v. Lanyan*, 9 N. Y. S. 625.)

the indictment need not name or otherwise identify the person before whom the oath was taken. A conflict with a District Court decision without more is no ground for certiorari (*Robertson & Kirkham, Jurisdiction of Supreme Court*, Sec. 825); it will be time to consider the point if and when the appellate court acts and creates the conflict.

CONCLUSION.

The history of this Court amply demonstrates that it attempts to select only the most important cases of the year for grants of certiorari. In the present case it is being asked—at a time when no Statute of Limitations could conceivably prevent a re-indictment—to repair the error of a clerk or a minor government attorney who has left out of an indictment what his own common-sense tells him ought to be in it. We suggest that the only way to make the Government obey the law is to refuse to bail it out of the predicament its own carelessness or utter pride of opinion has produced.

The petition should be denied.

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